No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS (a Copartnership),

Appellants,

vs.

PARK, BENZIGER & CO., INC. (a Corporation),

Appellee,

and

PARK, BENZIGER & CO., INC. (a Corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS (a Copartnership),

Cross-Appellees.

OPENING BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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OPENING BRIEF FOR APPELLANTS.

May it please the Court:

This is an appeal, R. 542, from a judgment, R. 67, based upon a verdict, R. 66, assessing damages in the sum of $72,687.50 in favor of appellee, Park, Benziger & Co., Inc., a corporation, and against appellants, Pierre Bercut and Jean Bercut, in a civil action for repudiation or anticipatory breach of a contract for sale of wine.

JURISDICTIONAL STATEMENT.

The statutory provision that sustains the jurisdiction of the District Court is Judicial Code § 24 first, 28 USC § 41(1), granting the familiar original jurisdiction to the District Courts of all suits of a civil nature at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000, and is between citizens of different states. The complaint, R. 2, and amended complaint, R. 10, disclose the requisite diversity by showing that appellee is a New York corporation, its assignor a citizen of New York, and the appellants are citizens of California, and it alleged damages in the aggregate principal amount of $242,050 for breach of contract.

The statutory jurisdiction that sustains the appellate jurisdiction of this Circuit Court of Appeals is Judicial Code § 128, 28 USC § 225, granting the familiar jurisdiction to "review final decisions in the District Court".

STATEMENT OF THE CASE.

The amended complaint, R. 10, declares upon a written contract dated January 29, 1943, and a written modification thereof dated February 3, 1943. We print the contract as Appendix A, and the modification as Appendix B. The preamble of the agreement identifies the parties thereto as follows, R. 15:

> "This Agreement entered into this 29th day of January, 1943 by and between Pierre Bercut and Jean Bercut, doing business as a co-partnership, under the firm name and style of P & J Cellars, License No. 14-P-175 at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part and

> Chateau Montelena of New York, License No. WW9 with offices at 48 West 48th Street in the City and State of New York herein represented by Serge Hermann, its duly authorized special representative residing at No. 321 West 55th Street, Borough of Manhattan, City and State of New York party of the second part."

"Chateau Montelena of New York" is simply a fictitious business name used by Louise Hermann, the wife of Serge Hermann, who signed the contract on behalf of "Chateau Montelena of New York". In the charge to the jury, the trial Court said, R. 514:

> "The evidence shows that 'Chateau Montelena of New York' was simply a business or trade name adopted or used by the wife of Serge Hermann in connection with the wine contract with the Bercuts, and that Serge Hermann had complete and entire charge of the business dealings under the name of Chateau Montelena of New York. I therefore instruct you that for the purposes of the present lawsuit you are to consider Serge Hermann and Chateau Montelena of New York as one and the same, and the act or conduct of either as the act or conduct of the other, and any mention of either in these instructions shall be deemed to include the other or both."

Serge Hermann is a wine broker operating out of an address in New York, R. 170. The business of the contract with the appellants Bercut was handled entirely by Serge Hermann, whose wife left it to him to handle as he pleased, R. 183. Prior to the contract with appellants Bercut, neither Serge Hermann, nor his wife, had ever bought or sold wine on their own account, R. 187, with the single exception of a previous transaction, relating to one carload, with a man named Feldheym, R. 187.

Appellee, Park, Benziger & Co., Inc., a corporation (which became the assignee of the contract sued upon as will hereinafter appear) was engaged in business in New York as an exporter and importer and "had a whiskey and wine department", R. 71. Their Vice President, Mr. Philip Elman, testified, R. 71:

> "We were importing quite a lot of wines from various countries. Most of our business had been import, and due to conditions over in Europe that came about in 1940 with France, we continued to receive less and less import wines, and we were more or less becoming interested in doing a domestic wine business to fill that gap of imported wines, and so we commenced to do business with certain domestic manufacturers of wines looking to find and acquire certain agencies for good producers to sell in place of our import wines.
>
> Q. What was the situation in the United States and interstate in the wine industry or the wine market at the commencement of the year 1943?
>
> A. At that time the OPA and the freeze of grapes the previous year by the United States Government for use for raisins for the armed forces of this country created a tremendous shortage in available grapes for wine in California, which resulted in a very short crop and manufacture of grapes in the year preceding that, in 1942, so that in 1943 the condition of the wine market had become so acute there were no wines available for sale to us. We purchased small lots of wine that we were able to get, but, of course, we were interested more or less in acquiring larger amounts of wine to substantiate the amount of business that we had, because we couldn't import wines. We could find no wines on the market."

Elman and Hermann had a conversation on or shortly before January 5, 1943; Elman testified, R. 131-132:

"We were discussing the wine situation and that things were getting very scarce, and he said, 'Well, I think with all my connections and my knowledge of the wine business, if I went to California I might be able to contact my friends out there or find some wines'.

I said, 'Well, that seems to be quite a good idea'. * * * We said we were very much interested in buying wines, and if he found anything that had any value to it, we would be very much interested in it, because we wanted to find something with a good agency that we could continue on, on a domestic wine basis."

Hermann came to San Francisco and in a roundabout way learned that appellants Bercut were holding a stock of wine (which turned out to be the 26,691 cases later covered by the contract) which they had obtained from the California Wine Association (R. 83) and racked, i.e., laid down in storage a year or two before. On cross-examination Hermann testified (R. 188-189):

"Q. You say you were looking for some California wines that you could buy while you were here in January, 1943. How long did you look for some wine that could be bought? How long did it take you to find it?

A. I was extremely fortunate. I happened to know practically every jobber and every winery in the country, and when I came over to San Francisco I found that the Palace Hotel was filled with every person interested in the wine industry. I came up to see my friend Mr. Baer with the idea he might let me know where I could get some wine, and just by sheer accident Mr. Baer happened to know the Bercuts and happened to know that the Bercuts had put some wine away a couple of years before, and mentioned to me that due to the fact they were French

that I might go down and see them and find out if something could come of it.

I went down to see the market [a meat market operated by the Bercuts in San Francisco] without any hope to find wine, but as a man interested in his business and following it up, I followed—I was going to try to do what I could. * * *

Q. How long did it take you to find the Bercut wine?

A. Two weeks.

Q. During that two weeks' period were you looking generally for wine?

A. I certainly was.

Q. During that two weeks' period did you find any other wines than the Bercut wine that might be available?

A. Absolutely impossible. I looked everywhere, talked to any number of people, and sent out many personal letters, and received replies, every one the same: 'We can't give you any line; we are tied up; we have no wine.' ''

Hermann and Elman were both strangers to appellants Bercut and there had never been any previous business dealings between them. On January 29, 1943, the contract sued upon was entered into. It called for shipment of wine at the rate of a carload a month to begin "during the month of February, 1943". On February 3, 1943, the modification was made, and it stated, *inter alia:*

> "That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence."

Hermann, as a witness for appellee, testified to the following discussion taking place when the contract was signed on January 29, 1943, R. 171-172:

"Q. Will you tell us whether or not in the course of your negotiations for that wine with the Bercut Brothers you told them where or with whom you expected to market the wine?

A. On the day of the signature, or the signing of the contract, I explained to them that it was my intention to appoint a distributor in New York and have them take over the sale of that wine, and that I had particularly in mind Park, Benziger & Company, subject of course to their accepting the proposition after I had explained it to them. * * * It came up when Mr. Evans asked me what name he was to make out the contract.

Q. What was the conversation with respect to that?

A. The conversation was as follows: 'I am not altogether sure as to whether Park, Benziger will take over the contract or not, because it is subject to their finding it to their liking.'

Q. Did they ask you in what name to make out the contract?

A. That is what Mr. Evans asked me, 'In what name do you want it, to Park, Benziger, or do you want it to Chateau Montelena?' And I answered, 'You might just as well make it Chateau Montelena, as I am going to submit it to Park, Benziger & Company, but send the samples to Park, Benziger & Company.'

Q. Now, Mr. Hermann, you did at that time arrange for the shipping of samples to Park, Benziger; you did with them?

A. Yes."

On February 2, 1943, the day before the modification was signed, Hermann, at San Francisco, sent the following telegram to Elman, at New York, R. 74:

> "Have definitely completed the finest bottle deal dreamed of. Suggest you phone me on receipt this wire. Kindly advise Irene am well. Regards."

When Hermann entered into the contract with appellants Bercut, Hermann knew that if the contract should be thereafter breached by the Bercuts, neither Hermann nor Park, Benziger & Co. could obtain other wine in the market to take the place of the Bercut wine, but notwithstanding that knowledge by him he never informed nor gave any notice to the Bercuts that if at any future time they broke the contract he would be unable to replace the wine. He testified, R. 220-221:

> "Mr. Naus. Q. Up to and including January 29, 1943, in your negotiating conferences with the Bercuts did you at any time state to them or tell them that if at any time in the future they should break the contract you would be unable to get any other wine to replace it?
>
> A. Conversation of that nature never took place between us. The contract was satisfactory; we were happy with it and took it up.
>
> Q. Let us stay with the question: Up to and including the time that the contract was signed you never gave them any notice to that effect, did you? You never gave them any information to that effect?
>
> A. Pardon me, Mr. Naus. Do you mean signed after I brought it to them, or signed between Bercut and myself? May I have the question a little clearer?
>
> Q. I will reframe it. I will go a little further. The final paper that went to the final form of the contract was a paper signed on February 3, 1943, wasn't it?——that letter modifying it?

A. Between the Bercuts and Chateau Montelena?

Q. Yes.

A. Yes.

Q. Up to and including the time that letter of February 3, 1943, was signed and delivered to you, had you ever informed the Bercuts if at any future time they broke the contract you would be unable to replace the wine?

A. We didn't even speak about it, no.

Q. The answer is you did not?

A. I did not."

Hermann also knew that this was the first occasion in which the Bercuts ever sold any wine to anybody. He testified, R. 215:

"Q. Then, as I understand it, up to the date of the signing of the contract on January 29, 1943, there had been no wine put out under a label or a mark 'Bercut Freres'?

A. As far as I know, not. They told me they were not in the wine business.

Q. So far as you know, they never were?

A. No, I never saw the 'Bercut Freres' label.

Q. You told us yesterday, if I understood it, that you kept yourself informed and in contact with wine merchants, brokers and the like who were in that field, and when you first heard about this arrangement, that you went down to the butcher shop to find them, and that is the first time that you heard of them in the wine business?

A. That is correct.

Q. Up to that time no one had heard of them in the wine business?

A. No, sir.

Q. Up to that date they had never sold any wine, had they?

A. That is correct, so far as I know."

At the time of entering into the contract the Bercuts were ignorant of the fact that if they thereafter breached the contract other wine would not be obtainable in the market by Hermann or Park, Benziger & Co., R. 343 and R. 420. The Bercuts had never previously been in any wine deal. They had varied business interests but up to the time of this deal with Hermann they had never sold so much as one bottle of wine to anyone in the world, R. 400. It had simply happened that in February, 1941, or two years before the deal with Hermann, the Bercuts had obtained majority control and management of a cold storage business in San Francisco, known as Merchants Ice and Cold Storage Company, R. 399, 418-419, and found there considerable idle or vacant cold storage space, R. 419. "It was a place well suited for wine but there was no wine in it", R. 419. Peter Bercut testified, R. 419-421:

> "Q. Did you and your brother Jean first acquire this stock of wine before or after you took over that management of Merchants?
>
> A. After.
>
> Q. At the time you took over the management of Merchants Ice you first fired out the old management, did you?
>
> A. Yes.
>
> Q. After taking it over did you or not have considerable idle or vacant space down at Merchants Ice?
>
> A. Very much so. It was a place well suited for wine, but there was no wine in it.
>
> Q. Prior to that time had you ever dealt in wine?
>
> A. No, sir.
>
> Q. Had you ever bought or sold wine before?
>
> A. No, sir, outside of what I could use in my own family. * * *

Q. About how soon was it after you took over Merchants Ice that you and Jean started to acquire this stock of three hundred odd thousand bottles?

A. Within the first six months, I believe.

Q. I believe you acquired the wine in bulk or gallonage from Fruit Industries in the first place?

A. Not exactly. It was acquired that way, but it was that the Fruit Industries agreed to bottle it for us.

Q. You bought it in bulk and arranged with them and you supplied the bottles and arranged with them to bottle it and deliver it to you in bottles?

A. Yes.

Q. Then you laid it down in the Merchants Ice?

A. Yes, that is the only way I knew it.

Q. After laying it down, you and your brother Jean kept it under a fairly constant or even temperature from the time you acquired it until——

A. The engineer for Merchants Ice attended to that.

Q. At the time you and Serge Hermann signed this original contract of January 29, 1943, at the time you entered into that contract did you then know that if at any time thereafter you did not deliver the wine as called for by the contract that the buyer could not acquire it elsewhere?

A. I didn't have the least idea of that.

Q. Did anybody up to and including January 29th give you notice or warning or information that if you did not deliver that wine it could not be gotten somewhere else?

A. No. Our deal was entirely between ourselves, and it did not go outside; I didn't go out and talk about it, or anything. I just kept that part of our own business."

Park, Benziger & Co. received the samples and found them satisfactory, R. 84. Hermann returned to New York,

arriving there on Saturday, February 13, 1943, R. 86. The contract called, *inter alia,* for labels to be prepared and supplied by the buyer; and on Monday, February 15, 1943, Hermann, at New York, wrote air mail on the letterhead of Park, Benziger & Co. a letter to Peter Bercut, c/o Bercut Brothers, R. 86-88, a copy of which we append as Appendix C. Contemporaneously with the writing of that letter Hermann and Elman entered into an oral deal under which Park, Benziger & Co. "purchased the contract" from Hermann, R. 75, which oral deal of February 15, 1943, was reduced to two writings dated February 25, 1943. One paper was given by Hermann to Park, Benziger & Co., as follows, R. 83:

"Park, Benziger & Co., Inc.,
24 State St.,
New York, N. Y.

Dear Sirs:

As per our agreement, we hereby assign to you the agreement and all rights thereunder, made on January 29, 1943, with Pierre Bercut and Jean Bercut, doing business under the name of P. & J. Cellars, of San Francisco, California.

Yours very truly,
Chateau Montelena of N. Y.
Per Serge Hermann"

The other paper, dated February 25, 1943, was given by Park, Benziger & Co. to Hermann, as follows, R. 90-91:

"Mr. Serge Hermann,
48 West 48th St.,
New York, N. Y.

Dear Mr. Hermann:

In consideration of your assigning to Park, Benziger & Co., Inc. the contract which Chateau Montelena of New York, represented by Serge Hermann,

made with Messrs. Pierre and Jean Bercut, trading as P. & J. Cellars, of San Francisco, California, covering an approximate lot of 60,000 cases of Assorted Wines, we hereby agree to pay you a commission equal to 50% of the net profits derived from the handling and sale of these goods at wholesale or retail, and you are to exert your efforts to the best of your ability in the promotion and sale of the above merchandise.

You are also to participate in any further business we may have with P. & J. Cellars on the same basis. If we sustain a loss on any business with P. & J. Cellars, such loss shall be charged against future profits in the computation of your commission on future business.

Yours very truly,
Park, Benziger & Co., Inc.,
J. R. Benziger,
President."

Those two papers comprise the whole of the documentary basis of the arrangement between Hermann and Elman, R. 143-144. Thereunder, Hermann was to become an employe of Park, Benziger & Co. in promoting a sales market for the sale of the wine by Park, Benziger & Co., which in turn required the liquor licensing of Hermann as a salesman or employe of Park, Benziger & Co. under the law of New York. Elman testified, R. 97-98:

"Mr. Bourquin. Q. Following your purchase of that contract, you had arranged with Mr. Hermann, did you, you had entered arrangements for the services of Mr. Hermann in the sales of the wines?

A. Yes. We decided to employ Mr. Hermann as a salesman of Park, Benziger & Company, and we

submitted to the New York State Liquor Authorities an application for a solicitor's permit in New York State.

Q. That was a solicitor's permit issued at your request to him as a solicitor or salesman for Park, Benziger & Company?

A. Yes.

Q. Taking effect when?

A. Taking effect almost immediately, after we had decided to purchase the contract from him."

(A photograph of his salesman's license or "solicitor's permit" appears at R. 100.) Hermann was to give his full time to selling the wine for Park, Benziger & Co., R. 141-142. Elman testified, R. 140-142:

"Q. Then what in substance were the terms on which you told Hermann orally that you would take it over?

A. We discussed the matter thoroughly with him and we agreed to take over the contract and give him fifty per cent commission of the net profits on the sale of the merchandise.

Q. What did he agree to do?

A. Well, he agreed to sell us the contract for that.

Q. Was anything said about Hermann giving his time to selling the wine after you got it?

A. Yes, he asked us whether we would like to have him promote and sell the wines, and we said, 'Yes, it might be a very good idea,' since he knew, I thought, a lot more about the actual wines than we did at that time. I hadn't seen them. He seemed to know the people quite well, thought very highly of them, and he asked us whether we would like to do that, discuss that point, and we said, 'Yes,' and we decided he was to become an employee of

Park, Benziger & Company as our salesman to sponsor the wine and sell it and promote it, help in it in every way he could.

Q. You said he was to become your employee. Was he to become a full-time employee and sell this Bercut wine?

A. A salesman for us to sell the Bercut wine.

* * *

Q. Was the arrangement or not that he was to give his full time to selling the wine after you got it from the Bercuts?

A. Yes, he would give his full time to it."

Hermann was to do that selling at his own expense; Elman testified, R. 147-148:

"Q. Incidentally, in that fifty per cent arrangement you had with him, first orally and later in writing, Hermann going around selling was to be at his own expense, wasn't it?

A. That is right.

Q. Any and every expense, of whatever nature, he may have incurred from the beginning, January, 1943, down to the present time has been an expense of his own?

A. That is right."

He further testified, R. 149:

"A. We gave Mr. Hermann a fifty per cent net commission on the sale of the Bercut wines. That was the arrangement. Now, in so far as expenses are concerned, after we took the contract and he came to work for us as a salesman to promote the wines in that deal, then the monies that he spent in the promotion for it was for his own account.

Q. Yes.

A. That is right, after that."

He further testified, R. 150-151:

"Q. As I understood some of your answers, you are suggesting, at least, that Hermann was simply an employee or was to be an employee or commission salesman for Park, Benziger & Co.?

A. That is right, in the sale of these wines."

Hermann testified, R. 190-191, in substance to the same effect.

A domestic wine deal, and particularly one of this nature, was something new to Park, Benziger & Co. and was in the nature of new promotion by them. Elman testified, R. 162-163:

"A. Well, we are never in touch with the domestic market to that point of where we could place a finger on a broker and say we could buy a particular wine from him, because we have never been in the domestic wine business.

Q. As a matter of fact, this was a brand new venture of yours, wasn't it, the Park, Benziger & Company?

A. Well, not a brand new venture entirely, but it was a new phase of business, yes, that's right. We had never purchased and sold California wines to any great extent before.

Q. You are brand new in the business as to wineries and wines generally?

A. That's right.

Q. Well, it was brand new to the company, in fact, this California still wine business?

A. Yes.

Q. As to handling it in quantities and as a continuous line?

A. Yes.

Q. You never had any experience with that before, had you?

A. No."

After some correspondence between the parties filled with promotional enthusiasm and speaking of having an artist design labels, and the like, Elman came to San Francisco, arriving April 16, 1943, R. 101, having been preceded by Hermann about a week. Elman looked at the wine or had conferences with appellants Bercut practically daily thereafter until the breaking of relations, on April 26, 1943. Elman testified, R. 101-102:

> "Q. Did you see Mr. Jean Bercut or Mr. Peter Bercut, or both of them, from time to time, after your first visit?
>
> A. Consistently; every day from the date I arrived. I believe I came here on a Friday. I saw him Friday and Saturday, and then we did not see him on Sunday, and Monday, which was a business day, we started in with our meetings again with either Mr. Jean Bercut or Mr. Peter Bercut, consistently, right through that entire week, working and arranging for the bottling of those wines. I went down to see the wines, I had never seen them before, saw how they were racked to get a picture of it so I could build it into a campaign of promotional sales. We had started taking films of the huge warehouse with Mr. Jean Bercut or Mr. Peter Bercut alongside the wines, looking at a bottle of wine. Those films were to be used for promotional work to show the huge 325,000 cases bottled, at least 325,000 bottles that were built into that magnificent warehouse there, that were aged and stored and racked. This was going to be the story on the business of aging wines in this country, it was something entirely new and novel. I mean it had never been done in the United States."

Meanwhile, appellant Jean Bercut had heard some disturbing information about the business history of Her-

mann, and Elman testified that the following occurred at a conference on April 26, 1943, at the office of the Bercuts, R. 111-115:

"Q. On that occasion will you tell us whether or not either of the Bercuts voiced any dissatisfaction with Mr. Hermann?

A. They certainly did.

Q. Will you tell us by whom and what it was; just go ahead and tell us.

A. Well, as I recall, Mr. Jean Bercut asked me to step in the office and asked Mr. Hermann to wait outside. He said, 'Mr. Elman, I would like to talk to you for a few minutes; Serge, would you sit down a few minutes until I get through?'. He said, 'Fine'. We went in and when I was in there with him he said, 'Mr. Elman, I have some very bad news for you'. He said, 'We have inquired about Mr. Serge Hermann and find he had some business dispute here in town and we would not like to do any business with him, we would like to have our contract with you'; I said, 'Well, that's fine; we are doing business together', I said, 'but what is this business dispute about?'. He explained the entire business dispute related to this Chateau Montelena dealing of some kind or other. So I told him them, I said, as I recall it, 'I am sorry'—Oh, yes. He said, 'We don't want to have anything to do with Mr. Serge Hermann because of the business deals we have heard about him'. I said, 'Well, the contract was assigned to Park-Benziger. You have been doing business with Park, Benziger right along and will continue to do business with Park, Benziger'. He said, 'We don't want to have anything to do with Hermann at all'. I said, 'Well, of course, that is impossible, because we have an arrangement with Mr. Hermann, but we will take care of him'. I said, 'We will take all the

wine that we are purchasing from you'. He said, 'No, we don't want him to have anything at all to do with the deal'. I said, 'Well, we don't have anything to do ——'. Then Mr. Evans, who was sitting in on this * * * said something—Mr. Peter Bercut handed him a contract and Mr. Peter Bercut said to me, handing me this contract, he said, 'Well, do you see anything in this contract that says Mr. Hermann has the right to assign?'. I looked at the contract and I said, 'Apparently there is nothing in there that says he has the right to assign'. I then made the point he had the right to assign because the contract went to our lawyers in New York and we told them to look over that contract and they forwarded it back to us as being all right legally, so far as they were concerned, the deal was excellent for us. So we naturally made arrangements to have the assignment completed and so on. Then I said, 'In all fairness', I said, 'you ought to have Mr. Hermann come in and tell his side of the story'. So Jean went out and called Mr. Hermann in and Mr. Hermann came in and they told him about what they had heard about Chateau Montelena. Mr. Hermann said he would be very glad to get in touch with some others in San Francisco who had told them about this business dispute, and who could explain any doubt that they had pertaining to it, and so forth. Then Mr. Peter Bercut gave Mr. Hermann the contract and said to him, 'Will you show me where this says in here that you have the right to assign that contract?'. Mr. Hermann's answer was, 'Will you show me where this says I haven't the right to assign the contract? You were doing business with Park-Benziger right along. What is it all about? If it has something that you do not like, why didn't you tell them about it?'. He said, 'You are doing business with them'. He said, 'Well, we want you to give us a personal release

from the contract, we don't want to have anything to do yith you, we want to do our business with Park, Benziger & Company; we don't want to have anything to do with you'. Mr. Hermann said, 'Well, if that's the way you want it, I have my agreement with Park-Benziger, it's all right with me'. They said, 'Yes, we want to have a personal release from you, because we want to do business with Park-Benziger; now, give us a personal release'. He said, 'Sure, if that's the way you feel about it it's all right with me, so long as the agreement can continue on with Park-Benziger and yourself'. So we left then.

Q. Did that rupture put an end to this cordial relationship that you had between you?

A. No, no, everything was smoothed out. Then, I might back up there a moment, Serge said it was all right with him, he was going to give them the release they wanted for the purpose of facilitating the deal."

With respect to the meeting on April 26, 1943, Hermann testified, R. 174-176, cumulatively.

Pursuant to the arrangement the parties again met on April 27, 1943, and with respect to the meeting on that day, Elman testified, R. 118-119:

"A. Well, that morning I came in I handed Mr. Evans an order which I had received from the mail, or in the mail, pertaining to the final shipment of another quantity of wine, and I laid it on the, on his desk, and told him to expedite the shipment on that. On the table as we came in were quite a number of copies of papers, it was a release. Mr. Peter Bercut was sitting down there. Mr. Jean brought us in and Mr. Evans handed Mr. Hermann these papers and said, 'This is the release we made up for you.' * * * He said, 'This is the release that we were talking

about yesterday.' Mr. Hermann examined it and there were some discussions there, and Mr. Hermann handed it to me and said, 'Is it all right Phil?' I looked at it and I said it was an agreement between Chateau Montelena and Serge—or P. & J. Sellars and Serge Hermann. I said, 'I have nothing to do with it. Evidently that is the release that Mr. Bercut was talking about. We have a contract. I can't see any objection to it.' I handed it to him and Serge signed it.''

With respect to the meeting on April 27, 1943, Hermann testified R. 176-177, in substance to the same effect. The writing signed by Hermann and the Bercuts on April 27, 1943 was received in evidence as Plaintiff's Exhibit 11, R. 178, and reads as follows:

"AGREEMENT.

THIS AGREEMENT entered into this 26th day of April, 1943 by and between Pierre Bercut and Jean Bercut doing business under the firm name and Style of P. & J. Cellars in the City and County of San Francisco, State of California hereinafter referred to as party of the first part and Serge Hermann represented to be the duly authorized special representative of the CHATEAU MONTELENA OF NEW YORK competent to act in its behalf party of the second part, WITNESSETH:

WHEREAS the parties herein referred to did on the 29th day of January 1943 execute a certain agreement containing certain terms and conditions and WHEREAS it is considered by mutual consent that it will be to the best interests of both parties that the said agreement be canceled in its entirety.

NOW THEREFORE for and in consideration of the sum of One Dollar ($1.00) each to the other in hand paid receipt of which is hereby acknowledged it is mutually agreed that all of the provisions, covenants, terms

and conditions that were specified, embodied or stipulated in said agreement are hereby declared null and void and without any force or effect, in the same manner and to all intent and purposes the same as if said agreement had never been entered into or had ever been written, and each of said parties shall be deemed to be free and clear of any and all claims, demands or obligations asserted by the one party against the other from the beginning of the world to the date hereof.

IN WITNESS WHEREOF said parties have hereunto set their hands this 27th day of April 1943.''

The foregoing gives the plaintiff's version of the occurrences on April 26 and 27 of 1943, because it is the version most favorable to the plaintiff and was accepted by the jury. Under the version of the defendants, the occurrences on April 26 and 27 put an end to the whole arrangement, not only with Herman, but with Park, Benziger & Co. as well.

The signing of the paper on April 27, 1943 was followed by an offer by Jean Bercut to Elman to sell three carloads of the wine to Park, Benziger & Co. at the contract prices, but for cash, whereupon Elman became angry as to the cash carloads (1500 cases a carload, amounting to 4500 cases). Elman testified, R. 121-122:

''Mr. Bourquin. Q. Will you tell us in substance what Mr. Jean Bercut said, how he put it, when he came back to the room.

A. When he told me that I said, 'What do you mean?' He said, 'You don't want any contract. I will give you three carloads of wine at the contract price, and that is all.' I said, 'What do you mean, three carloads of wine? We have a contract with you.' He said, 'Well, I will give you three carloads of wine at the contract price, and maybe later on—we will see,

we will see.' He said, 'For cash.' I said, 'What do you mean? We have a contract with you for 60,000 cases of wine. Now, you have a stipulated price in there and you have the quantity of merchandise in there, and that is what the company wants to be performed.' He said, 'No more contract. We don't want no more contract. I will give you three carloads of wine, and maybe later on the wine will be worth eight or nine or ten dollars to you.' I said, 'What do you mean, eight or nine or ten dollars? The price in the contract is stipulated at $5.25.' He said, 'Yes, I know, I know, but just three carloads of wine.' I said, 'We have a contract with you for 60,000 cases of wine at stipulated prices under certain terms. My company wants that contract performed, and that is what I am out here for.'

Then I got all excited and everything and walked out of the place, I guess.''

Elman treated the foregoing as a repudiation of the contract by the Bercuts, i. e., an anticipatory breach, and the original complaint in this case was filed about three weeks afterward, i. e., on May 19, 1943, R. 7. (The transcript shows a filing on May 1944 which is an error.)

The wine was not obtainable elsewhere, R. 161. Elman testified, R. 163:

"Q. From April 27, 1943 did the Park, Benziger Company ever through you or through anybody make any attempt or effort to go out in the market and bring in any substitute wines?

A. No; we felt it was impossible.

Q. Well, you did not do it, because you knew you couldn't get it; isn't that correct?

A. I think so. * * *

Q. You couldn't get it because there was none in the market, isn't that correct?

A. That's right.''

In the charge to the jury, the jury was charged, R. 520:

> "I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary it shows no available market. The rule in such case is that the measure of the buyer's damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract, which rule as specifically applied to this case now before you means that, if you find there was a breach, either (1) the amount of the buyer's outlay of expense in the course of preparing to carry out the contract before he knew that the seller would not perform, or (2) the net profits, if any, that the buyer was reasonably certain to have made if the seller had performed the contract."

The plaintiff made no proof of the amount of any outlay and therefore the question went to the jury on the issue of "net profits" claimed to have been lost by the plaintiff.

On that issue the plaintiff made no proof whatever with respect to any past experience that it had had in the matter of profits arising from the sale of domestic or California wine. It had had a previous experience to the extent of 8000 or 9000 or 10,000 cases of California wine. Elman testified, R. 153:

> "Q. What would you say was the aggregate number of cases of [bottled] wine that you had ever handled, California wine, the still wine, before the Bercut deal? * * *
>
> A. * * * I would say around 5000 cases.
>
> Q. That had been over what period?
>
> A. I might be wrong on that, sir. I recall now we did have some merchandise which we had bought in cased goods from a California shipper down south,

who was a bottler. It might have run into a little more—probably eight or nine thousand, 10,000.

Q. My immediate question was, that total was spread over what period of time?

A. Oh, I would say it was over a year—a period of about a year—yes, 1942, I think. That is about the time we started to buy California wine, because our French stocks had been depleted, and we had our customers coming in constantly asking us if we could purchase wines for them, you see.

Q. Was any of this California still wine that you are speaking of ever put out before the Bercut deal under your own label?

A. No.

Mr. Naus. As I understand it, Mr. Elman, this wine involved in that Bercut deal that Hermann dug up for you was the initiation of a new line of business in your company, wasn't it?

A. A new line?

Q. That is to say, having to do with California still wines under your own label?

A. Yes."

In addition to that past experience with California wine the plaintiff had further past experience to the extent of 2500 cases of California wine of the Chianti type, R. 88, which had been, independently of the Hermann contract, ordered by the plaintiff from appellants in connection with Hermann's letter of February 15, 1943, plaintiff's Exhibit 3. The plaintiff made no proof whatever of its profit experience in handling those wines. The plaintiff relied entirely on two price lists that were received in evidence as its exhibits 13, R. 308-311, and 15, R. 316-318, over the following objection of appellants, R. 306:

"Mr. Naus. Objected to first as outside the issues; secondly, upon the ground that the evidence is insuffi-

> cient to show and establish business in California wines of this type; third, on the ground there is no foundation to show any basis for any attempted effect of a calculation of supposed loss of supposed profits on that. There is no proof whatever—in fact, the proof is to the contrary—and no proof whatever that at the time of the contract, January 29, 1943, the defendants were put on notice or warning that if thereafter there was a breach, that loss of profits would be a consequence because of the unavailability of other wines in the market."

Exhibit 14 is a list posted by the plaintiff with a public authority in New York under the Alcoholic Beverage Control Act of that state and is headed "Schedule of Wine Prices to Retailers, Effective for the month of March 1943". In that list, at R. 311, the Bercut wines appear under the designation of "California 'P & B' Brand" and are priced to the retail trade at $10.51 a case for the dry wines and $10.96 for the sweet wines. Exhibit 15 is a list similarly posted with the same public authority and is headed "Schedule of Prices to Wholesalers, Effective for the month of May 1943" and, at R. 318, lists the price to the wholesaler at $6.75 a case for the dry wines and $7.50 a case for the sweet wines.

There is no evidence that any orders were taken or sales made under either list. The plaintiff's proof of expected profits lost depended entirely on the assumption that the 26,691 cases of Bercut wine (which were to be shipped over a period of years at the rate of one carload or 1500 cases a month) would be sold at the prices stated in those lists, and that the excess of those prices over the contract price per case paid to the Bercuts would evidence the expected gross profits to the plaintiff, from

which the following deductions were to be made in arriving at net profits: since the contract with the Bercuts was f.o.b. San Francisco and retail sales under the New York list were quoted f.o.b. New York, there would be a deduction of 35 cents a case for freight and insurance, R. 313-314, in retail sales. In addition to that, Elman, who was not an accountant or auditor and who did not produce any accounts or books, assumed that the appellee would have an overhead expense of six per cent of the selling price. Elman testified, R. 303-304:

"Q. Let me ask you, What did the costs and charges of your company run in April 1943 for the handling and sale of wines of the types specified in the contract?

A. Mr. Naus. One moment. Objected to upon all the grounds heretofore stated, and upon the further ground that from the evidence it appears that they had no previous experience in handling such wines.

The Court. They had previous experience in handling wines, imported wines. It is true that conditions were such that they felt the need of dealing in domestic wines, and they turned to California for the purpose of getting domestic wines.

The Witness. That is right, your Honor. * * *

Q. Having in mind the experience you have had with marketing and promotion of wines and applying that to these questions now; is that not true?

A. Yes. * * *

The Court. You would have to make that more specific: 20,000 cases or 60,000 cases or whatever you have in mind. * * *

Q. Mr. Elman, what would the costs and charges for handling and promotion and sales of wines——

The Court. Such as that described in the contract Exhibit 2——

Mr. Bourquin. Q (continuing). ——run you per case, per carload or per thousand cases in April 1943?

Mr. Naus. That is all subject to the same objection.

The Court. Overruled.

A. About six per cent of the price, the selling price, your Honor.

Mr. Bourquin. Q. Six per cent of the selling price?

The Court. Q. Whether it was 1000 cases, 5000 cases or 30,000 cases?

A. It was based on the total volume of business we do per year, your Honor."

The foregoing is all the evidence laid by appellee before the jury as a basis of supposing or finding a loss of expected profits, and the amount of the verdict makes it plain that the jury assumed that about half of the 26,691 cases would be sold at the retail price and the other half at the wholesale price.

The foregoing retail and wholesale lists show that it was the plan of appellee to put the Bercut wine on the market under a new label. Park, Benziger & Co. had never theretofore put on the market any domestic or California wine under their own label. Under the contract with the Bercuts the label was to be designed and supplied by appellee. Appellee made no proof of the cost of labels. Moreover, Elman testified to the dusty appearance of the bottles as they laid in the warehouse of appellants and to the need of washing and polishing the bottles and wrapping them in tissue paper in order to make them attractive for sale by appellee. This would be an expense of appellee and Elman admitted in his testimony that he did not know what the cost of it would be. He testified, R. 161:

"Q. Do you know what the handling and washing would amount to per case, for washing bottles and wrapping them in tissue paper and buying the paper?
A. I wouldn't know, sir."

With respect to the ability or inability of Park, Benziger & Co. to perform the contract, it developed at the trial that appellee is what is commonly known as a "dummy" corporation. It is and was a wholly owned subsidiary of another corporation, namely, Finlay, Holt & Company, R. 336. Appellee never at any time had a capital greater than the sum of $1000, R. 336. Upon organization it issued capital stock for the sum of $1000 in cash and this was its sole and only capital, R. 337-338. Any profits made by appellee were immediately paid out by it in the form of dividends to Finlay, Holt & Company, R. 338. Its current liabilities at all times equalled its current assets, R. 338. The purpose of the formation of this "dummy", as stated by Mr. Elman, was to limit the liability of the officers of the mother holding company. Be that as it may, it appears, without dispute, from the evidence that the responsibility of appellee was limited to its $1000 capitalization.

At the conclusion of all of the evidence, appellants moved for a directed verdict, R. 465, upon the following grounds, *inter alia,* R. 466-470:

"6. That the burden is on the plaintiff to show its own ability to perform, which ability has not been shown. In fact, the evidence shows that it would have had to finance the purchase of the wines under this contract with the Bercuts beyond the plaintiff's own means or assets.

7. That the plaintiff's claim is for the loss of profits, but the evidence fails to show that when the

contract was entered into on January 29, 1943, and as modified on February 3, 1943, that either or both of the defendants Bercut knew that the goods were not obtainable elsewhere or would not be obtainable elsewhere in the event of non-delivery by the defendants.

8. Upon the ground that the evidence in the case of loss of profit, such evidence as there is or to the extent that it could be said to be evidence, does not prove or show with reasonable certainty that the plaintiff suffered loss of anticipated profits, because the evidence shows that the plaintiff was launching a new enterprise with respect to the wine in suit, and the profits, if any, therefrom are left to guesswork, surmise, conjecture.

9. Upon the ground that lost profits have not been proved with reasonable certainty because the evidence shows that plaintiff had, during the year 1942, handled in various lots an aggregate of eight or nine thousand cases of California wines, but has made no showing of its loss of profits expected upon that wine, but on the contrary, instead of turning to better evidence has used worse or poor evidence by way of opinion or guesswork. * * *.

10. That lost profits have not been proved with reasonable certainty, because the evidence shows that concurrently and contemporaneously with the transaction covered by the contract of January 29, modified February 3, 1943, the parties in this litigation dealt in California wines of the Chianti type, or in Chianti type bottles, the wines being purchased by the plaintiff from the defendants to the extent of 3250 cases under the written order of February 15, 1943, followed to the extent of at least one carload, the evidence in other respects showing a carload is somewhere in the neighborhood of 1500 cases, ordered on April 27, 1943, and to the extent of an unspecified amount, apparently approximately a carload, at least a carload ordered

by the plaintiff from the defendant during the pendency of this suit, and the rule of law with respect to proof of lost profits being that past profits upon which the prediction must be made, that to the extent of past profits the loss may be shown from experience and from accounting records and accounting data and the like, which must be shown, and not be left to mere guess or surmise or conjecture or upon hope or expectation not founded upon past experience.

11. Lost profits have not been proved with reasonable certainty, because the evidence shows that the plaintiff intended to wash the bottles, the bottles containing the wine, and wrap each of them in tissue paper before reselling them.

The Court. It seems to me that was left undecided; in other words, left in the air.

Mr. Naus. No. It is hardly left in the air. It is worse than being merely in the air. I would like to add one further sentence to that.

The Court. Go ahead.

Mr. Naus. No proof of the labor cost thereof, nor has it been shown what capital would be used by the plaintiff in the conduct of their transactions in this line, and the amount of interest upon that capital.

12. That the plaintiff not only has failed to make such a showing of loss of anticipated profits as is required by the law, but, in the alternative, the plaintiff has also failed to prove the amount of any outlay by it in preparation for performance in lieu of the proof with reasonable certainly of lost profits.''

Subsequently to the verdict, appellants made a motion to set aside the verdict under Rule 50b FRCP, R. 463.

SPECIFICATIONS OF ERROR.[1]

I. The court below erred in denying appellants' motion for a directed verdict, and in the denial of the companion motion for judgment notwithstanding the verdict.

II. The court below erred in refusing our Instruction Request No. 32, R. 58, to-wit:

> "If you find from the evidence that plaintiff Park, Benziger & Co. was embarking or starting in a new venture in the matter of California wine, that is, were seeking to launch a new enterprise, and that they have not proved to your satisfaction that they can show, as a means of measurement, past profits in substantial dealing in California wine under their label and through their past experience, if they had any, in such dealing in California wine, then I instruct you that you should not, and the law says you cannot, award them anything for supposed loss of anticipated profits, because the fact of profits to be realized from a business about to be launched can exist only on paper and while profits may be possible, losses in the enterprise are just as possible, and in either case they are nothing more than contingent probabilities, and of too uncertain a character to constitute a basis for the computation of damages for the breach. The rule is the same regardless of whether the plaintiff had not previously conducted the business at all, or whether an established liquor business was simply adding a new line of merchandise, such as adding a new line of California wine."

To that refusal we excepted as follows, R. 493-495:

> "We except to the refusal to our request No. 32 in that in none of the requests on either side that you

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[1]For Statement of Points and Designation of Printing, see R. 546.

indicated you were going to give is there any instruction to the jury upon this matter in the case.

The Court. What is it?

Mr. Naus. The matter of whether or not as to the Bercut wine, the labeling of it under their own label and starting out with that whether the Park, Benziger Company were starting out with a new venture, putting it in the field of speculation. We except to the refusal of that request because——

The Court. Isn't that covered by 31?

Mr. Naus. I will have to look at that.

The Court. I have had these instructions so long I want to be sure that I do not become confused.

Mr. Naus. It deals with the same field as 31, except 31 deals with the matter of speculation generally, but 32 deals with the more narrow question that the evidence deals with.

The Court. Isn't that dealt with generally? When you say conjecture and speculation you have said everything you can about it.

Mr. Naus. I doubt it, because when we are dealing with a new business or a new branch of an old business, and the jury have the case given to them, knowing the court knows it could be found to be a new business or a branch of an old business, they may think they have been invited by the court to consider that they could grant damages.

The Court. Only in this sense, that they are engaged in the business of marketing or selling California wine. They were in the wine business. They imported wine. They sold whisky. They could be described as a new branch or a new venture related to California wines.

Mr. Naus. We will except to the refusal to give our Request No. 32 in that in no other instruction and in no other request is the jury being instructed on the narrow question with respect to an attempt to claim expected profits in a new enterprise."

III. The Court below erred in refusing our Instruction Request No. 34, R. 60-61, to-wit:

> "I further instruct you that even though lost profits be proved with reasonable certainty, nevertheless you must not award them unless you find from the evidence that on the 29th day of January, 1943, at the time the contract was entered into, the defendants Bercut then knew that if they did not thereafter deliver the wine it could not be obtained elsewhere; and if at the time of entering into the contract they did not have that knowledge, it is immaterial whether either or both of the Bercuts thereafter, and before non-delivery or refusal to deliver, learned or knew that the wine could not be obtained elsewhere. The only award of damages permitted by the law for breach of a contract of sale by a seller are such damages as may be fairly said to have been known at the time of contracting to be the probable result of a breach of contract by the seller, which requires the existence and proof of the fact that at the time of contracting the seller knew that the goods could not be thereafter procured elsewhere in the market."

To that refusal we excepted as follows, R. 495:

> "We except to the refusal to give defendants' request No. 34 in that in refusing to give that request the court is taking entirely out of the case the rule of Hadley v. Baxondale with respect to the knowledge or ignorance at the time of the contract of January 29th as modified by the modification of February 3, 1943, with respect to whether either or both of the Bercuts had knowledge or were ignorant at that time that if they thereafter did not deliver the wine it could not be obtained elsewhere; that we consider the jury is entitled to be instructed upon that subject. We know nothing in form or substance in the request

as given in any way contrary to law, and by refusing that request the court is refusing to instruct the jury on that subject."

IV. The court below erred in refusing our Instruction Request No. 37, R. 63, to-wit:

"I further instruct you that you must consider the fact that because no wine was delivered under the contract to the plaintiff it follows that the plaintiff was relieved from business hazard and responsibility in handling and disposing of the wine over a period of years, and was freed from any risks involved, and from time and trouble. From the award, if you make any, to the plaintiff, you should make a reasonable deduction from any arithmetical or calculated amount of net profits, because of that release and freedom from risk, hazard and responsibility, and saving from expenditure of time, trouble and energy over the period of time originally contemplated for completion of delivery in monthly installments. The amount of such deduction is not fixed in any particular percentage by the law which leaves it to the good sense and wisdom of an intelligent jury."

To that refusal we excepted as follows, R. 495:

"We except to the refusal to give defendants' request No. 27 in that in refusing that request the court is refusing to tell the jury at all that they may take into consideration the freedom from hazard and responsibility and risk of the plaintiff that the nonperformance by the defendant has afforded.

Mr. Brownstone. That is 37.

Mr. Naus. 37, yes. That that is the only instruction upon the subject, so far as I know, it is proper in form and substance, and by the refusal of that request No. 37 it would appear to us that the court is refusing to instruct at all upon that subject."

V. The Court below erred in modifying our Instruction Request No. 35, by refusing to give the portion thereof italicized below, R. 61-62:

> "The term 'profits', as I have used it in these instructions, does not mean gross profits. 'Gross profits' are really not profits at all within the contemplation of the law, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. If a buyer is entitled to an award at all because of loss of profits, the award must be confined to net profits. 'Net profits' are the gains from sales after deducting the expenses of doing business, together with the interest on the capital employed. *In addition to those deductions you must also deduct the 50% selling commission which was to have been paid by the plaintiff to Serge Hermann because that would be clearly a selling expense of the plaintiff if Serge Hermann were only an employe or salesman on commission instead of a partner or joint adventurer.*"

VI. The Court below erred in failing to give any instruction upon the burden of proof. In the course of settlement of the instructions, pursuant to Rule 51 FRCP, R. 471, the following occurred: The Court began by stating which of the requests on both sides would be given, modified, or refused, and then stated, R. 472:

> "These instructions will be followed by what I call our stock instructions. Those instructions are the instructions usually given by the court in civil cases with which both sides are familiar."

Thereafter, at R. 505-506, in the course of settling Defense Request No. 36, the following occurred:

> "The Court. Referring to the defense request No. 36, yesterday I stated that I expected to give that

instruction. I now advise counsel that I will give the instruction, but I shall delete therefrom the following: 'And the burden of proof is on the plaintiff.' That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course.

Mr. Naus. No, I don't think so, your Honor, because I take it in your stock instruction you will deal with the burden of proof, so I take no exception to that deletion.

The Court. Very well.''

However, in the charge to the jury the Court did not give the jury the stock instruction, nor any instruction, on the burden of proof.

VII. The Court below erred in not instructing the jury that the maximum OPA markup was 25 percent, in response to the inquiry received by the Court from the jury during their deliberations. After the jury had retired to deliberate on their verdict, but before returning the verdict, the Court made the following announcement, R. 526:

''(The jury retired at 11:00 a.m., and at 2:25 p.m. court was convened in the absence of the jury.)

The Court. I received a request from the jury which reads as follows: 'Please get us copy of OPA price regulation on retail and wholesale prices effective sometime during August, 1943.' ''

Appellants made the following request with respect to a special instruction with respect to the inquiry, which request was not granted, R. 535:

''Mr. Naus. (continuing)——and we would suggest that, in accordance with your judicial knowledge of the regulation in question, that you, under the circumstances, give to the jury an additional or special instruction stating to them that beginning as of August

9, 1943, and continuing down to the present time there is a percentage markup maximum of 25 per cent on the sale by Park-Benziger of this wine to anybody, either wholesaler or retailer, or to anyone, not for consumption."

VIII. The Court below erred in giving, R. 518, plaintiff's proposed Instruction No. 10, reading, R. 32:

"You are instructed that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been offered tending to show that the plaintiff is or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion."

Appellants excepted to the giving of that instruction, as follows, R. 501-502:

"We except to the giving of plaintiff's instruction No. 10 upon the ground, first, that it speaks of the plaintiff's ability or inability as being a matter of defense for a defendant. On the contrary, we say that in every case where a plaintiff sues for a breach of contract, one of the implications of his complaint and one of the elements of his position is that he be at all times able to perform, and that shifts the burden that rests upon a plaintiff to make a showing of ability into a defense upon the defendant of showing an inability.

We except to the instruction further upon the ground that regardless whether the burden is upon the plaintiff or upon the defendant the Court instructs

the jury that it is not necessary for the plaintiff to have had ability to perform independently of the credit that would obtain by getting the wine through performance by the other party. And we except to the instruction on the further ground that the Court not only puts the burden of a showing of inability on the defendant, but makes that be tested by the presence or absence of insolvency."

I.

THE COURT BELOW ERRED IN DENYING THE DEFENSE MOTION FOR A DIRECTED VERDICT UNDER THE SEVENTH GROUND OF THE MOTION. (SPECIFICATION OF ERROR I.)

The seventh ground of the motion for a directed verdict was that the evidence fails to show that when the contract was entered into either or both of the defendants Bercut knew that the goods were not obtainable elsewhere in the event of non-delivery by them. That is an essential element of the case for lost expectancy of profits attempted to be sustained by the plaintiff. The evidence is clear, positive and uncontradicted that appellants were ignorant of the fact at the time the contract was made, and Hermann, who knew the fact, gave them no notice or warning. The controlling statute, *Uniform Sales Act,* § 67 (*Calif. Civil Code,* § 1787),[2] was the basis of the decision in *Mar-*

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[2] "§1787. Action for failing to deliver goods. (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is

cus & Co. v. K. L. G. Baking Co. (N.J., 1939), 3 Atl. (2d) 627, wherein the highest Court of New Jersey affirmed a judgment nonsuiting a buyer on facts identical in legal effect with the facts at bar. The plaintiff-buyer had bought bakery ovens for resale at a profit in the ordinary course of business. There was non-delivery by the seller, and the buyer was unable to obtain ovens elsewhere in the market. The seller-defendant, like the appellants here at bar, had never previously sold any merchandise of the kind covered by the contract. *Inter alia* the Court said (3 Atl. (2d) at 631, col. 2, and 632):

> "And so the seller of goods is under a duty to respond in damages for such losses as would probably result in the ordinary course of things from a breach of the contract under the special circumstances known to the parties at the time it was made. Such are ordinarily considered by the law as reasonably within the contemplation of both parties to the contract. Where the special circumstances are not known to the party chargeable with the breach, the law deems—again drawing from the opinion of Baron Alderson—that he 'had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract,' and his liability is measured accordingly. Hadley v. Baxendale, [9 Exch. 341] supra; Pope v. Ferguson, 82 N.J.L. 566, 83 A. 353; Holland v. Jones-Howe Co., 98 N.J.L. 787, 121 A. 725; Weiss v. Revenue Building & Loan Assn., 116 N.J.L. 208, 182 A. 891, 104 A.L.R. 129; Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 47 L. Ed. 1171; Williston on Contracts (Rev. Ed.), sections 1347, 1355, et seq. * * *

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the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. [Added by Stats. 1931, p. 2255.]"

And it would seem that where (as plaintiff asserts was the case when the second contract of May 5th was made) the probability of an immediate resale was in the contemplation of the seller, he is liable for the natural consequences of a breach under such special circumstances. But, in the event, it is requisite, to render the seller liable for such special damages as are here claimed to have resulted from the buyer's inability to perform his sub-contract, that the seller knew, at the time of the making of the principal contract, that goods of like kind could not be procured elsewhere by the buyer for the performance of his sub-contract, and that therefore the injury thus resulting was within the contemplation of the parties as the probable consequence of a breach of the principal contract. Williston on Contracts, Rev. Ed., sec. 1347; A.L.I. Contracts, sec. 330; Globe Refining Co. v. Landa Cotton Oil Co., supra; Czarnikow-Rionda Company v. Federal Sugar Refining Company, 255 N.Y. 33, 173 N.E. 913, 88 A.L.R. 1426.

There is nothing to suggest that the parties here contemplated inability of the buyer to obtain equipment elsewhere for the performance of such resale contract as it might make; rather the contrary. Defendant was a mere baker, unfamiliar with the equipment market; and plaintiff, although conversant with the trade conditions, did not, at or prior to the making of either contract, communicate to defendant the utter lack of such a market—if such was the case—for the fulfillment of its prospective sub-contract, if defendant should default in the performance of the principal contract; and so the special damage claimed to have been sustained was not within the contemplation of the parties as the likely consequence of the breach of contract pleaded. Indeed, plaintiff, in the early part of June, 1937, looked to 'the open market' for ovens, but found there was not 'an available market for the purchase of Fish 16-foot rotary ovens.'

In this connection, it is worthy to note that, while the contracts in suit provided for the sale of sixteen-foot ovens, and for delivery on May 15th, if plaintiff's version of the transaction be adopted, the resale contract (dated May 5th) obligated plaintiff to make 'immediate delivery' of three eighteen-foot ovens.

This principle is implicit in Section 67 of the Uniform Sales Act of 1907 (4 Comp. St. 1910, p. 4663, R.S. 1937, 46:30-73), providing that, where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. This section follows Section 51 of the English Act, and seems to conform to the common law rule. Cruthers v. Donahue, 85 Conn. 629, 84 A. 322, Ann. Cas. 1913C, 221; Bartolotta v. Calvo, 112 Conn. 385, 152 A. 306; 1 U.L.A., p. 370, et seq. It is the principle generally applied. Williston on Contracts (Rev. Ed.), sec. 1347. And if the spirit of the Uniform Sales Act, R.S. 1937 46:30-1 et seq., is to be served, uniformity of interpretation is required.

Whether it be regarded as founded in the common consent of the parties, or as quasi-contractual in nature, it is an obligation imposed by the law on the guilty party to answer in damages for the reasonably foreseeable consequences of his breach. He is not justly chargeable with a greater liability than was contemplated by the parties; for, in a case such as this, it is his undoubted right, by express provision, to alter the standard for the admeasurement of damages in the event of a breach, i.e., to stipulate for an enlargement or curtailment of the liability thus imposed, or even for liquidated damages, regardless of the loss actually suffered. Globe Refining Co. v. Landa Cotton Oil Co., supra.''

The foregoing case is squarely in point and is, so far as a diligent search discloses, the only case in point under the Sales Act. It should control the decision at bar, for a number of reasons:

1. The rule of interpretation of the Sales Act is laid down by *Calif. Civil Code,* § 1794 (Sales Act, § 74), which says:

> "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it."

Speaking of Sales Act, § 74, the draftsman has said (*Williston, Sales,* § 617, pp. 1032-3):

> "Section 74 is not contained in the English act, and introduces a new principle of interpretation which it is hoped the courts may carefully regard. Generally when a part of the law is codified, the courts in considering the effect of the Code have regard to the law of the jurisdiction as it existed before the passage of the Code. And if the Code appears to have been intended not as remedial legislation, but rather to state in exact form law previously existing, the implication is strong that the rule of the Code is similar to that previously in force. **The primary purpose of the Sales Act is to introduce uniformity,** and though in the main it purports to state law previously existing, it is not the law of any one State, but, where the law in the several States differs, what may be regarded as the better doctrine. Accordingly no inference is permissible that the law of any particular State is intended to be codified. The law of all the States must be considered, and the purpose to unify that law must be borne in mind."

2. Independently of the legislative command of uniformity of interpretation under Civil Code, § 1794, uniformity is the clear rule of judicial decision in California.

Prior to the adoption of the Uniform Sales Act in 1931 (Stats. 1931, p. 2234; Civil Code, §§ 1721-1800), the legislature had in 1917 adopted the Uniform Negotiable Instruments Act (Stats. 1917, p. 1531; Civil Code, §§ 3082-3266d), and in the judicial decisions thereunder the rule has become clear that uniformity of interpretation is paramount over ordinary rules of interpretation. This was first laid down in 1919 by Justice Wilbur, who spoke for the Supreme Court of California, in *Utah State Nat. Bank v. Smith,* 180 Cal. 1, 179 Pac. 160, where he said (180 Cal. at 3):

> "It is generally held that it is the **duty of the courts** in construing this law to have in mind the purpose of securing uniformity in the law of commercial paper. State Bank, etc. v. Bilstad, 162 Iowa 443, 136 N.W. 204, 144 N.W. 363, 49 L.R.A. (N.S.) 132; Felt v. Bush, 41 Utah 462, 126 Pac. 688; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N.E. 679, Ann. Cas. 1913C, 525; Broderick v. McGrath, 81 Misc. Rep. 199, 142 N.Y. Supp. 497; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N.E. 392, 14 L.R.A. (N.S.) 842."

And he then quoted a passage from a case from another jurisdiction, with respect to the need of uniformity of decision, wherein the following ground was taken:

> "The question is one of business expediency, and not of logic or equity as applied to an individual case."

The Appellate Courts of California have steadily adhered to the rule: *Security Commercial and Savings Bank v. Southern Trust and Commerce Bank,* 74 Cal. App. 734, 761, 241 Pac. 945, 956, col. 1; *Charles Nelson Co. v. Morton,* 106 Cal. App. 144, 149, 288 Pac. 845, 847; *People's Finance & Thrift Co. v. Shaw-Leahy Co.,* 214 Cal. 108, 111-112, 3 Pac. (2d) 1012, 1013, col. 2; *Pratt v. Hopper,* 12

C.A. (2d) 291, 294, 55 Pac. (2d) 517, 519, col. 1. "Uniform laws must necessarily fail of their purpose, unless there is uniformity in their interpretation and application", *Charles Nelson Co. v. Morton,* supra. In the case of *Pope v. Ferguson* (1912), 82 N.J. Law 566, 83 Atl. 353, 355, col. 2, the Court said concerning the Uniform Sales Act:

> "The primary purpose of the codification as expressed in its title was to make uniform the law concerning the sale of goods. Any construction of the statute, therefore, which would throw it out of harmony with rules of law generally prevailing, relating to that subject, would be in direct violation of its expressed object. It is consequently necessary to ascertain whether there is any generally accepted rule existing in other jurisdictions, prescribing the measure of damages in actions by the vendee, for failure to deliver the goods, where he has made a contract for the resale thereof."

The Court then reviewed *Hadley v. Baxendale,* 9 Ex. 341, *Benjamin on Sales,* § 1237, and 24 A. & E. Ency. Law 1155, and concluded:

> "There can be no recovery of profits on special contracts of resale made after the contract of purchase. This being the state of the law at the time of the codification of the law of sales by our Legislature, and the purpose of that codification being to make uniform the law relating thereto, we are entirely clear that it was not the intention of the Legislature to except from the general rule of damages declared in the sixty-seventh section of the act cases in which, after the making of a contract for the sale of goods, the buyer has made a contract for the resale thereof."

When, 19 years later, the legislature of California "adopted" the statute it adopted that interpretation with it. 23 *Cal. Jur.* 794, § 172.

3. The opinion in the New Jersey case, supra, under Sales Act, § 67, is based upon the fundamental rule in the landmark case of *Hadley v. Baxendale* (1854),[3] 9 Ex. 341, 156 Eng. Reprint 145, 26 Eng. L. & Eq. 396. That leading case was adopted into the law of California in the case of *Mitchell v. Clark* (1886), 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529, and has been steadily followed in California[4] since. The clear and sound black and sound black-letter statement in *McCormick on Damages,* § 138, p. 562, reads:

> "The leading case of Hadley v. Baxendale lays down the rule that damages for breach of contract can be recovered only for such losses as were reasonably foreseeable, when the contract was made, by the party to be charged. In other words, such losses must be either of the type usually resulting from breach of like contracts, or, if unusual, the circumstances creating the special hazard must have been communicated to the defaulter before he made the bargain."

Inter alia in *Mitchell v. Clark,* supra, the Court said (emphasis ours):

> "This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because, in the usual course of events, the purchaser could have supplied himself with like commodities at the market price. And if special circum-

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[3]For an excellent history and explanation of "The Rule of Hadley v. Baxendale", see McCormick on Damages (1935), §138, p. 562 et seq.

[4]E.g., *Hunt Bros. Co. v. San Lorenzo Water Co.,* 150 Cal. 51, 87 Pac. 1093, L.R.A. N.S. 931, where the Supreme Court said that under our Civil Code, *Hadley v. Baxendale* "has been universally accepted and followed (150 Cal. at 56). "The rule in *Hadley v. Baxendale* has been discussed in a multitude of cases and generally followed", *Overstreet v. Merritt,* 186 Cal. 494, 503, 200 Pac. 11, 15 (quoting the rule).

> stances existed, entitling the purchaser to greater damages for the defeat of a special purpose, known to the contracting parties, (as, for example, if the purchaser had already contracted to furnish the goods at a profit, **and they could not be obtained in the market),** such circumstances must be stated in the declaration, with the facts which, under the circumstances, enhanced the injury. 1 Suth. Dam. 764."

It is in the rule in *Hadley v. Baxendale* that supplies "the distinction between damages for breach of contract, and damages for tort", *Hunt Bros Co. v. San Lorenzo Water Co.,* 150 Cal. 51, 56, 87 Pac. 1093, 1095, col. 2.

4. The opinion in the New Jersey case, supra, under Sales Act, § 67, also cites *Williston, Contracts,* § 1347. In that section Williston said:

> "When a defendant has been notified, before entering into the contract in question, of facts indicating that unusual damages will follow or may follow his failure to perform his agreement, he is liable for such damages. Common consequential damages of this sort are those suffered from loss of a resale. The defendant may have had notice of a sub-contract but not of the price at which the resale was to be made. In such a case he will be liable for such ordinary profit as might be expected on a resale. Even though no contract for a resale had yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated, **and defendant knew that other goods of the kind contracted for could not be obtained by the buyer."**

In subsequent sections, § 1356, "The rule in *Hadley v. Baxendale",* and § 1357, "Basis of the rule in *Hadley v. Baxendale",* Williston discusses the matter further.

5. The opinion in the New Jersey case, supra, under Sales Act, § 67, also cites American Law Institute, *Restatement, Contracts,* § 330. That section reads:

> "§ 330. In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, **it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.**"

6. The opinion in the New Jersey case, supra, under Sales Act, § 67, also cites *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U.S. 540, 47 L. Ed. 1171, which has since become a leading American case, as a glance at Shepard's citations will show. Therein, Mr. Justice Holmes rationalized the rule of *Hadley v. Baxendale* and found its true basis in the theory of contract. He said (in the following passage, later written into the text of *Williston, Contracts,* § 1356), in 190 U.S. at 543:

> "It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind."

The case has been cited with approval by the Supreme Court of California, *California Press Mfg. Co. v. Stafford*

Packing Co., 192 Cal. 479, 486, 221 Pac. 345, 347, col. 2.

Mr. Justice Holmes further stated (190 U.S. 544-545):

> "The question arises, then, What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. Messmore v. New York Shot & Lead Co., 40 N.Y. 422. See Sawdon v. Andrew, 30 L. T. N. S. 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2 ed. 10, in Eblinger Actien-Gesellschafft v. Armstrong, L.R. 9 Q.B. 473, 478, 'it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability.' Mr. Justice Wiles answered this question, so far as it was in his power, in British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499, 500: 'I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. * * * If that [a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival] had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. **The knowledge must be brought home to the party sought to be charged, under such**

circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' The last words are quoted and reaffirmed by the same judge in Horne v. Midland R. Co., L. R. 7 C. P. 583, 591; S. C., L. R. 8 C. P. 131. See also Benjamin, Sales, 6th Am. ed. § 872.

It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as a matter of law to charge the seller with special damage on that account if he fails to deliver the goods.''

7. The opinion in the New Jersey case, supra, under Sales Act, § 67, also cited *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.,* 173 N.E. 913, 255 N.Y. 33, 88 A.L.R. 1426, a decision in the state wherein the present plaintiff Park, Benziger & Co. has its office. In that case, relating to the sale of sugar, a judgment of over $400,000 in favor of a buyer was reversed because of a failure to show a special knowledge by the seller at the time the contract was made. The Court after discussing *Hadley v. Baxendale* and other leading authorities, said *inter alia* (173 N.E. at 916):

''Notice of the special circumstances which may cause special damage to the buyer must be had by the seller at the very time when he contracts to sell. There must be notice 'at the time of or prior to contracting.' Chapman v. Fargo [223 N.Y. 32] supra. 'No notice to the seller thereafter would increase his liability.' Per Lehman, J., in Goldstone v. Wade, (Sup.) 123 N.Y.S. 114, 115. 'The consequences must be contemplated at the time of the making of the contract.' Per Holmes, J., in Globe Refining Co. v. Landa Cotton Oil Co., supra. 'No doubt notice subsequent to the formation of the contract, though prior to the breach, is insufficient.' Williston on Contracts, § 1357. The seller must

have 'notice **when the contract was entered into** that the loss in question would be a natural consequence of the breach.' Id. § 1355.

'Even though no contract for a resale had yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated, and defendant knew that other goods of the kind contracted for could not be obtained by the buyer.' Williston, § 1347. 'The true distinction seems to be: **If besides notice of contemplated resale the defendant also had notice that other goods could not be obtained to supply the place of those not delivered—then the profits of a resale may be recovered; if there was no such notice it would be held that loss of profits of a resale was not within the contemplation of the parties.**' Sedgwick on Damages, § 162. The cases of Hammond & Co. v. Bussey, 20 Q.B. Div. 79, Delafield v. J. K. Armsby, [116 N.Y.S. 71] supra, and Carleton v. Lombard, Ayres & Co., 149 N.Y. 137, 43 N.E. 422, relied upon by Czarnikow, serve but to emphasize the very rule thus stated.''

8. The opinion in the New Jersey case, supra, under Sales Act § 67, is soundly within the very text of the rule ''laid down by Baron Alderson in the leading case of Hadley v. Baxendale''[5] which reads:

'' 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to

[5] *American Surety Co. v. Wheeling Structural Steel Co.*, 4 Cir., 114 F. 2d 237, 239; therein after quoting the foregoing passage from *Hadley v. Baxendale*, the Court said: ''This is the classical statement of the rule applicable in case of damage arising out of breach of contract, now generally accepted here and in England. 15 *Am. Jur.* 451.''

have been in the contemplation of both parties, **at the time they made the contract**, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.' ''

At bar the contract was for sale of California wine. Before the present lawsuit, who ever heard of commercial blends of California wine not being available in the market? "Generally, and in the great multitude of cases" of breach by a seller of California wine there would be availability of the wine elsewhere in the market, and the damages would be measured by the excess, if any, of the market price over the contract price. In the absence of express liquidation of the damages in and by the contract itself (*Civil Code,* § 1671), the implication from the silence of the contract would be that the parties had impliedly contracted about the damages upon the basis of "the great multitude of cases not affected by any special circumstances". It requires an expression within or outside the written contract, i.e., a notice of "special circumstances" stated by the buyer to the seller and an acceptance thereof by the seller, at the time of contracting, to introduce a different measure. The notice and acceptance established

the "contemplation" by the parties of the possibility of damages differing from the measure in the "great multitude of cases".

II.

THE COURT BELOW ERRED IN REFUSING TO GIVE THE INSTRUCTION IN DEFENSE REQUEST NO. 34.

The requested instruction, and the exception to the refusal to give, are set out in Specification of Error III. We have argued under the next preceding head that a verdict should have been directed for defendants under the seventh ground of the motion for a directed verdict. However, if the Court rules that the record does not raise the question of law favorably to appellants, then the question of fact should have been submitted to the jury whether appellants knew at the time the contract was entered into that if they did not thereafter deliver the wine it could not be obtained elsewhere. Therefore, without repetition hereunder, we here incorporate the points, authorities and argument under the seventh ground of the motion for a direction. The case went to the jury exclusively on the theory of loss of expected profits because of unavailability of wine in the market, and in that context Defense Request 34 read, R. 60-61:

"Defense Request No. 34

> I further instruct you that even though lost profits be proved with reasonable certainty, nevertheless you must not award them unless you find from the evidence that on the 29th day of January, 1943, at the time the contract was entered into, the defendants Bercut then knew that if they did not thereafter deliver the wine it could not be obtained elsewhere; and if at the time of entering into the contract they did not have that knowledge, it is immaterial whether

either or both of the Bercuts thereafter, and before non-delivery or refusal to deliver, learned or knew that the wine could not be obtained elsewhere. The only award of damages permitted by the law for breach of a contract of sale by a seller are such damages as may be fairly said to have been known at the time of contracting to be the probable result of a breach of contract by the seller, which requires the existence and proof of the fact that at the time of contracting the seller knew that the goods could not be thereafter procured elsewhere in the market."

III.

THE COURT BELOW ERRED PREJUDICIALLY IN ITS RULINGS REGARDING THE RIGHT OF APPELLEE TO RECOVER CONJECTURAL LOSS OF ANTICIPATED PROFITS.

(a) Preliminary statement.

In our statement of the case, we have set forth in detail the proof offered by the appellee of damages suffered by it.

The jury was charged (R. 520) that since the wine was not obtainable elsewhere in the market, appellee was entitled to recover either its outlay of expense in preparing to carry out the contract or its net profit. Appellee offered no proof of the amount of its outlay, and appellee's entire case was therefore directed to an attempt to recover profits. Although net profits rather than gross profits are the true measure of recovery, on analysis the proof offered by appellee purported to prove gross but not net profits.

As evidence of expenses to be incurred in the handling of the wine, appellee offered the testimony of Elman, unsupported by any books, records or documents, to the effect (1) that the freight on this merchandise from San Francisco would be 35¢ per case, and (2) that the over-

head on a sale at retail in New York would be 6% of the sale price and on a sale at wholesale 2% of the sale price. No attempt was made to prove the cost of washing and polishing the bottles and wrapping them in tissue and no attempt was made to prove the cost of labels to be supplied by plaintiff, the cost of capital to be employed, the value of Elman's services, etc.

As will hereinafter appear, the jury made no deduction for the expense of Hermann's services as a salesman with a 50% selling commission. Further, appellee made no attempt to prove the prices it would have been entitled to charge for this wine under the provisions of the Emergency Price Control Act. Despite the fact that the jury, after retiring to deliberate, evidenced their bewilderment at the state of the evidence respecting O.P.A. mark-ups and the instructions of the Court in regard thereto, the Court refused to inform the jury that the legal mark-up that could be charged by appellee was limited to 25% of its cost. (R. 526-541.)

Instead of proving its past experience in the sale of wines, both imported and domestic, and the percentage of profit realized on those sales, plaintiff relied on the unsupported speculation of Elman that all of the wine covered by the contract could have been sold in accordance with statements of proposed prices filed by plaintiff with the New York State Liquor Authority. There is, therefore, a total absence of evidence to support a judgment for profits.

Notwithstanding the foregoing state of the evidence, the Court, after advising counsel that the instructions to be given by it would include "our stock instructions" (R. 427) and thereafter in response to a statement of Mr. Naus indicated that the stock instructions would con-

tain an express instruction on burden of proof (R. 505-506), but utterly failed to give any instructions to the jury whatsoever with respect to burden of proof. Proper instructions prepared by appellants with respect to the measure of damages supported by authority cited in the instructions proposed were refused by the Court.

The size of the verdict can only be accounted for as the result of these cumulative and highly prejudicial errors.

(b) The evidence was insufficient to support a judgment for the recovery of profits.

The law respecting the right of a plaintiff to recover net profits is well settled. If plaintiff is embarking on an entirely new venture, or fails to show by evidence past profits in the sale of the same or similar goods, he cannot recover for a conjectural loss of anticipated profits:

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, 702, 252 Pac. 780, 785, and cases;

Note, 32 *A.L.R.* 120, at 153-156;

8 *Cal. Jur.* 777, Sec. 38;

Central Coal & Coke Co. v. Hartman, 8 Cir., 111 Fed. 96, 98-99;

Iron City Toolworks v. Welisch, 3 Cir., 128 Fed. 693, 695-696;

California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, at 485 (and cases there cited), 221 Pac. 345, 347, 32 *A.L.R.* 114, 117-118 (distinguished in *Natural Soda Products Co. v. Los Angeles,* 23 Cal. (2d) 193, 143 Pac. (2d) 12, 17);

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. (2d) 239, 242, Col. 2;

Thrift Wholesale Inc. v. Malkmillion Corp., 50 F. Supp. 998, and cases at 1000.

It is not enough for a plaintiff to testify that in his opinion there was strong demand for the product agreed to be sold and that he could have sold the product at a profit. Such speculations on the part of plaintiff's witness are no better than the speculations of a jury. Evidence of past profit experience must be furnished:

Central Coal & Coke Co. v. Hartman, 111 Fed. 96 (C.C.A. 8);

Iron City Toolworks v. Welisch, 128 Fed. 693 (C.C.A. 3);

Terre Haute Brewing Co. v. Dwyer, 116 Fed. (2d) 239 (C.C.A. 8);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. (2d) 113;

Salaban v. East St. Louis Co., 1 N. E. (2d) 731 (Ill.).

See also,

Stephany v. Hunt Brothers, 62 Cal. App. 636;

Austin v. Roberts, 130 Cal. App. 328.

It is incumbent upon the plaintiff in such an action to prove all of the elements which are required in order to determine its net profits. "Gross profits" are really not profits at all. He can only recover his net profits, which are the gains made from sales, after deducting the value of the labor, materials, rents and all expenses, together with the interest on the capital employed:

Coates v. Lake View Oil & Refining Co., 20 Cal. App. (2d) 113;

Landon v. Hill, 136 Cal. App. 560;

Columbus Mining Co. v. Ross, 218 (Ky.) 98, 290 S.W. 1052; 50 *A.L.R.* 1394, and Note at 1397.

Defendant is under no duty to prove any of the elements which go into the determination of plaintiff's net

profit. In other words, the rule is not that plaintiff proves its gross profit and then defendants offer evidence of expense from which to determine net profit. Plaintiff must prove both the gross and net profit and defendant is under no duty to furnish evidence thereof:

Mahana v. Los Angeles Co., 82 Cal. App. 710;
Central Coal & Coke Co. v. Hartman, 111 Fed. 96 (C.C.A. 8).

Testing the evidence offered by appellee by the foregoing rules of law, it is apparent that the evidence offered to the jury was evidence of purported gross, but not of net profit. The amount of the gross profit was based not upon the past experience of appellee in dealings in California wine (although Elman testified that in the year prior to the trial plaintiff had dealt in approximately 10,000 cases of California wine, a not unsubstantial amount), but upon Elman's unsupported assertion that these wines could have been sold to the retail trade in New York at a mark-up of about 100% of their cost to appellee. The only evidence of expense offered was the unsupported speculation of Elman that regardless of the volume or amount of business done, the overhead on retail sales would average 6% of the sale price and the overhead on wholesale sales 2% thereof. No evidence was offered of the expenses incurred by Elman and Hermann traveling to San Francisco in order to carry out the contract; no evidence was offered respecting the cost of washing, polishing and wrapping the wine bottles; no evidence was offered respecting the value of Elman's services or of any of the other employees or salesmen of appellee, or of capital employed. No attempt was made by appellee to offer evidence of the price at which the wine could have legally been sold under the Emergency Price Control Act and in spite of its request, the jury

was left to speculate upon ambiguous and misleading testimony given on cross-examination of appellee's witnesses. The only evidence of damages offered was the testimony of Elman plus the worthless testimony of the witnesses, Cholet (R. 231 et seq.) and Lusinchi (R. 253 et seq.) to the effect that a shortage in wine had developed and the market was going up. How or in what manner this testimony could establish the actual dollar loss of appellee, which is all appellee is entitled to recover herein, was not made clear.

At the close of all of the evidence, appellants moved for a directed verdict upon the grounds, among others, that the evidence did not prove with reasonable certainty that appellee suffered a loss of anticipated profits; further, that although the evidence showed that appellee during 1942 had handled an aggregate of 8000 or 9000 cases of wine, no showing of the profits realized upon the sale of that wine was made; further, that although in 1943 appellee had purchased from defendant 3250 cases of Chianti type wine, no evidence was offered with respect to the profits made on these sales; further, because no evidence was offered showing the cost of washing the bottles and wrapping them in tissue, although appellee intended to perform this service, nor was any evidence offered of what capital would be used by appellee in carrying out this transaction and the amount of interest paid upon such capital. (R. 466-470.) The motion for directed verdict was proper and under the authorities hereinbefore set forth should have been granted.

Appellee either deliberately or inadvertently left the matter of its loss of profits to the field of speculation and conjecture. Under such circumstances the motion for directed verdict should have been granted.

(c) The Court below erred in failing to instruct on burden of proof.

Under our specification of error VI we have set forth the proceedings respecting the giving of instructions on burden of proof. Nowhere in the instructions given by the Court is there any instruction respecting the burden of proof or the definition of what constitutes a preponderance of evidence. Appellants failed to except to the action of the trial Court in deleting the last sentence from their instruction No. 36 for the reason, as stated by Mr. Naus, that they assumed that the stock instruction on burden of proof would cover the matter deleted. (R. 505-506.) The importance of this error of the trial Court cannot be overestimated.

When the California codes were originally enacted in 1872, Section 2061, Code of Civil Procedure, provided that the jury were to be the judges of the effect or value of the evidence addressed to them but that they were to be instructed by the Court on all proper occasions with respect to seven propositions which they should bear in mind in weighing the evidence. Proposition 5 reads as follows:

> "That in civil cases the affirmative of the issue must be proved and when the evidence is contradictory the decision must be made according to the preponderance of evidence;"

Failure to instruct with respect to these matters where such failure is prejudicial, is ground for reversal.

Scarborough v. Virgo, 191 Cal. 341.

The unsatisfactory nature of the evidence with respect to appellee's lost profits has been heretofore pointed out. In the face of this evidence the failure of the Court to instruct at all on burden of proof was error prejudicial to appellants.

(d) The Court below erred in refusing instruction request No. 32.

Request No. 32 (R. 58), quoted in Specification II, was a correct statement of law, not covered by any instruction given. It told the jury that appellee could not recover lost profits in an entirely new venture in the absence of evidence of past profits in dealings in California wine. This evidence was available to appellee but it failed to produce the evidence. That the instruction correctly stated the law is supported by the following authorities:

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, 702, 252 Pac. 780, 785, and cases;

Note, 32 *A. L. R.* 120, at 153-156;

8 *Cal. Jur.* 777, Sec. 38;

Central Coal & Coke Co., v. Hartman, 8 Cir., 111 Fed. 96, 98-99;

Iron City Toolworks v. Welisch, 3 Cir., 128 Fed. 693, 695-696;

California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, at 485 (and cases there cited), 221 Pac. 345, 347, 32 A. L. R. 114, 117-118 (distinguished in Natural Soda Products Co. v. Los Angeles, 23 Cal. (2d) 193, 143 Pac. (2d) 12, 17);

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. (2d) 239, 242, Col. 2;

Thrift Wholesale Inc. v. Malkmillion Corp., 50 F. Supp. 998, and cases at 1000.

(e) The prejudicial error in not instructing the jury that the maximum OPA mark-up permitted plaintiff was 25 per cent.

Loss of profits may not be considered as an element of damages where the business from which they would have resulted was, or would have been, conducted in violation of law.

Shelley v. Hart, 112 Cal. App. 231 at 242;

25 *Cor. Jur. Secundum,* page 519, damages, par. 42;
17 *Cor. Jur.,* page 797, damages, par. 119.

It is a matter of common knowledge that under the provisions of the Emergency Price Control Act and Executive Order No. 8734 of April 11, 1941, the Office of Price Administration and Civilian Supply has regulated the sale prices of most, if not all, commodities. It has been held that the regulations issued by the price administrator have the force of law and override provisions of contracts even though such contracts were made and executed prior to the passage of the particular regulation in question:

Long Island Structural Steel Co. v. Schiavone-Bonomo Co., 53 Fed. Supp. 505, affirmed, 142 Fed. (2d) 557 (C.C.A. 2);

In re Kramer & Uchitelli, Inc., 43 N. E. (2d) 493, 288 N. Y. 467;

Sanders v. M. Lowenstein Co., 45 N. E. (2d) 457, 289 N. Y. 702.

The only testimony offered with respect to OPA ceiling prices is the following Hermann testified:

"Q. Speaking of regulations, there is an OPA ceiling mark-up on wine, isn't there?

A. As far as I know, yes.

Q. Well, you know about it, don't you?

A. Well, as far as I know, there is an OPA mark-up on wines.

Q. A wholesaler like Park, Benziger could not mark it up over 25 per cent of their cost, could they?

A. A wholesaler like Park, Benziger—and again, I am not an authority on OPA matters—would have the right to determine the price according to the price that existed for a wine equivalent to the wine they were buying in March, 1942.

Q. And that was true only up to August 1943, wasn't it?

A. I believe so.

Q. In August 1943 their mark-up was specifically limited to 25 per cent over cost?

A. In August 1943.

Q. In August 1943, yes.

A. If the price had already been determined prior to August 1943, if I understand it right, that was the price.

Q. Any price determined before that had to be first approved, did it not, by OPA?

A. You mean prior to August 1943?

Q. Prior to August 1943.

A. Mr. Naus, I am sorry, but I am no expert on OPA matters and I really don't know."

Elman testified:

"Q. Having in mind that you tell us that you were in charge of the sales, posting of prices—you are familiar with that, an expert in that—perhaps I would not be presuming too much to assume that you know that in August 1943 the OPA put a ceiling on you; you know that, don't you? * * *

A. There is a revision—there is a revision constantly on OPA ceilings. At that particular time I don't recall what the ceiling was. Do you have the OPA revision of that month?

Q. I have something that looks like it. I will ask you whether or not in August 1943, beginning then and ever since——* * *

The Witness. If I have been qualified as an expert, maybe I will get a job.

Mr. Naus. No, I am not trying to qualify you as anything—as an expert in that respect. I am merely meeting on cross-examination what you purport to say on direct examination, Mr. Elman. At that I think you are doing as well as many of them down at the OPA, as I have observed them. I am asking you whether you know that in the month of August 1943,

beginning then and continuing ever since, you have been under an OPA ceiling of 25 per cent in your mark-up.

A. Yes.

Q. So that had this contract been carried out, under these price lists or anything else, for three months, beginning with the fourth car and continuing under this contract, you could in no event have sold at a greater mark-up than 25 per cent; now you know that, don't you?

A. No, I don't think so. At least, my understanding of it would be that since our price was established prior to this one, the price fixing of the merchandise took place before this law came out and subsequent to that. It differentiates—it says anything you purchase from this time on shall be at a fixed mark-up. Our contract and purchase of the wine happened prior to this. We had already established an OPA price on that merchandise. I doubt very seriously whether this would have meant a retention in price. So far as I am concerned, I don't believe it would have. We would have kept the same prices.

Q. Aside now from the New York State Authority price * * * had you prior to August 1943 ever established with the OPA any price?

A. Oh, yes.

Q. When and where and with whom?

A. When the OPA came out, when New York State took on the new Hallowell bill, a law which stated we had to submit the price to them the month preceding the month in which we were going to sell it, and when the OPA came out with prices, the Hallowell stipulated the top sheets of every distributor were to read that all prices submitted in New York State conformed with OPA price regulations, to which we attested, after we had gotten our price from OPA.

Q. Beginning with what date?

A. I don't recall the exact dates. It was prior to that when the OPA fixed the price of merchandise

in the liquor business. We filed the New York State schedule with that in mind. New York State required that qualification in the prices submitted to that."

At the request of appellants the Court gave instruction No. 36 (R. 62-R. 520) deleting from the instruction the words "and the burden of proof is on the plaintiff". The instruction as given read as follows:

"In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling."

As a result of this incomplete record and the ambiguous instructions given, the jury sent a message to the Judge, after it had retired to deliberate, as follows:

"Please get us copy of OPA price regulation on retail and wholesale prices effective some time during August, 1943." (R. 526.)

The portion of the record showing the disposition of this request is set forth in R. 526 to R. 541 and all of this portion of the record is of importance. The Court, after reviewing the situation and commenting upon the action of Mr. Bourquin, one of counsel for appellee, in violating the understanding of all parties, including the Court, that all objections to instructions under Rule 51 of the Rules of Civil Procedure were to be made before the jury was instructed, requested counsel to stipulate that certain portions of the transcript heretofore set forth might be called to the attention of the jury. (R. 533.) In answer to this request Mr. Naus, one of counsel for appellants, stated that of course any part of the transcript could be sent to the jury but that it was the

position of appellants that the Court had judicial knowledge of the regulations and that the regulation respecting the 25% mark-up was perfectly clear. In this connection Mr. Naus stated to the Court:

> "In that connection and having that in mind we feel confident of our position as to judicial knowledge of the law and the application here, we think the regulation is perfectly clear on the subject—and we would suggest that in accordance with your judicial knowledge of the regulation in question that you under the circumstances give to the jury an additional or special instruction stating to them that beginning as of August 9, 1943 and continuing down to the present time there is a percentage markup maximum of 25% on the sale by Park, Benziger of this wine to anybody, either wholesaler or retailer, or to anyone, not for consumption. (R. 535.)"

After Mr. Naus had thus clearly made known to the Court the action which the desired the Court to take (F.R.C.P., Rule 46) the Court stated: "I will not do that at this time, Mr. Naus". The Court then added "but if there should be any further request from the jury upon the suggestion I will entertain a request from you in that regard". (R. 535.)

Therefore, despite the fact that the jury asked for specific information with respect to the OPA regulation effective during August 1943, the Court refused to give this information although a proper request was made by counsel for appellants that the jury be properly advised. As a result, the jury were left to speculate and conjecture on an issue of law about which they should have been advised by the Court. They were not even instructed that the burden of proof was upon the appellee and the verdict therefor was a calculation based on an insufficient and incomplete record and insufficient instructions.

It is obvious that what the jury did was to take the wholesale and retail price lists placed in evidence by appellee over the objection of appellants, accept the instruction of the Court that damages were to be computed on 22,191 cases, and then figure that half of these cases would have been sold at the retail list price and half at the wholesale list price. This error necessarily requires a reversal of the judgment, because the result of the error is that the damages of $72,687.50 awarded by the jury are excessive, in that the evidence does not warrant or justify a verdict in any amount greater than $29,432.85 if Hermann's 50% is not deducted, nor any amount greater than $14,-746.43 if his 50% is deducted.

The jury were limited to 22,191 cases (26,691 minus 4,500) as a basis for their award. (R. 522.) The award of $72,687.50 is at the rate of $3.27½ per case. The OPA ceiling is a markup of 25%. The three cars offered for cash at the contract prices would have carried the deliveries, one carload a month, into August, 1943. The basic Maximum Price Regulation covering Brewery, Distillery Winery Products, is MPR 445 of August 9, 1943. (8 Federal Register 11,161.) The regulations are published in the Federal Register, and the Congress has enacted that "The contents of the Federal Register shall be *judicially noticed*", 44 USC 307, last sentence, and published OPA ceiling prices are judicially known, *U.S. v. Lederer,* 7 Cir., 140 F. (2d) 136, 139, col. 2. It is therefore judicially known that appellee could not use a markup greater than 25%, and therefore that any verdict awarding a higher amount is contrary to law, is excessive to the extent that it exceeds 25%. In the regulation, MPR 445, the "maximum prices for sales of * * * packaged wine by wholesalers * * *" is embraced by Article V. (Secs. 5.1 to 5.10.) Under Section 5.4(b), "a wholesaler's maximum

price per case * * * shall be his net cost per case * * * multiplied by the percentage markup for the item being priced as follows: * * * (ii) 1.25 for wine", i.e., one and one-quarter times the "net cost" or a markup of 25%. The elements of "net cost" are stated in Section 5.3(b) and, speaking generally, in the context at bar are (1) purchase price and (2) freight. Section 7.12, Definitions, says in (b)(3) that a "wholesaler" means "any person * * * engaged in the business of buying and selling * * * wine without changing the form thereof, to persons other than consumers", which exactly describes Park, Benzinger & Co., and without regard to whether they sold at wholesale under their wholesale list, or at retail under their retail list.

At bar, the elements of "net cost", i.e., (1) purchase price and (2) freight, are as follows:

Year	Dry	Sweet
1943	$5.25	$6.00
1944	5.50	6.25

Those prices are f.o.b. San Francisco, which is the basis of Park, Benzinger & Co.'s quotations for sales at wholesale. (Plaintiff's Exhibit 15, wholesale price list for May, 1943. R. 316.) Their retail price list (Exhibit 14, R. 308) is f.o.b. New York, which brings in 35 cents a case for freight and handling. In sales at retail, therefore, their OPA elements of "net cost" adds 35 cents per case, making the cost (for markup purposes) the following:

Year	Dry	Sweet
1943	$5.60	$6.35
1944	5.85	6.60

With deliveries at the contract rate of one carload a month plus an extra holiday car, and allowing for the three cars admittedly offered for cash at the contract price, there

would be 22,191 cases (26,691 minus 4,500) as a basis of damages, or 6 cars of 1,500 cases each, or a total of 9,000 cases, shipped in 1943, and the remainder of 13,191 cases shipped in 1944. The maximum markup of 25% would be as follows:

Year	Price	Markup
1943	$5.25	1.3125
1944	5.50	1.375

The expense of doing business (aside from Hermann's 50% selling expense) was 2% of selling price, after deducting which the following net profit (before deducting Hermann's 50% selling expense) per case would result:

Year	Net Profit
1943	$1.285
1944	1.35

Applying those unit rates we reach *maximum* permitted net profits as follows:

Year	Total
1943— 9,000 cases at $1.285	$11,565.00
1944—13,191 " " 1.35	17,807.85
Total.....	$29,372.85

Adding $20.00 per car for loss of interest through paying cash in advance for the first three cars, results as follows:

4,500 cases, loss of interest	$ 60.00
22,191 " " " profits	29,372.85
26,691 cases	$29,432.85

Deducting Hermann's selling expense of 50% ($14.686.43) of $29,372.85 reaches a final result of $14,746.43 as the maximum possible OPA profits loss suffered by Park, Benzinger & Co.

The result should be substantially the same even in the absence of an OPA ceiling of 25% markup. Under the

principle of *Hadley v. Baxendale,* an extraordinary or unusually high markup is not allowed in measuring damages, if the high markup was not made known to the Bercuts at the time they contracted, *Guetzkow Bros. Co. v. Andrews,* 92 Wis. 214, 66 N.W. 119, 52 A.L.R. 209, 53 A.S.R. 909, leading case; 8 R.C.L. Damages, Section 66; Mechem on Sales, Sections 1766 and 1767. In *Guetzkow Bros. v. Andrews,* supra, the Court rejected profits on resales under markup "amounting to from 100 to 150 per cent". Such an extraordinary markup was rejected in the absence of notice of it to the seller at the time he contracted, and a judgment against the buyer was affirmed for failure to sustain the burden that was on him, as part of a damage claimant's case, to put the Court "in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction". (66 N.W. at 122, col. 1.) We quote *Mechem, Sales,* Sections 1766-1767:

> "If when the contract of sale is made, the seller knows not only of the fact of the resale, but also of the particular price to be received upon it, there can usually be but little difficulty in holding him responsible upon the basis of that particular price. If, however, though he knows of the fact of the resale, he does not know the price, he could not be held liable upon the basis of the particular price if it were unusual or extravagant. He must, nevertheless, be held to contemplate that the resale is to be at a fair and reasonable profit at least, and, if he knows that the article is not one which has a market price, he may be held liable upon the basis of the contract price, if that is not such as to yield an unreasonable or unfair profit.
>
> Ordinarily, it is said, the price to be received upon the resale 'would presumptively, be held to be a reasonable price; but if the facts in any given case are

such as to show such price to yield an extravagant or extraordinary profit,' the seller will not be bound in absence of knowledge of it; 'and, in order to assess the damages, the court must be put in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction.' "

The markup under plaintiff's retail list for April, 1943, posted in March, is nearly 100%, and there is not even a scintilla of evidence that the Bercuts knew of it when they contracted. The markup under the *wholesale* list posted in and for May, 1943, under prices f.o.b. San Francisco, figures as follows:

	Cost	Posted Price	Markup
Dry	$5.25	6.75	28.6%
Sweet	6.00	7.50	25%

The *retail* list must be wholly rejected under the foregoing authorities, and under the principle of *Hadley v. Baxendale.* The wholesale markup under Exhibit 15 approximates the maximum OPA markup.

IV.

THE COURT BELOW ERRED IN MODIFYING DEFENSE REQUEST NO. 35 (SPECIFICATION OF ERROR V), I.E., IN REFUSING TO INSTRUCT THE JURY TO DEDUCT HERMANN'S 50% SELLING COMMISSION FROM ANY AWARD TO PLAINTIFF.

The plaintiff cannot be awarded gross profits; the expenses of doing business must be deducted, *Coates v. Lake View Oil & Refining Co.,* 20 Cal. App. (2d) 113, 119, 66 Pac. (2d) 463, 466; *Terre Haute Brewing Co. v. Dwyer,* 8 Cir., 116 Fed. (2d) 239, 242, col. 2.

The jury was instructed (R. 515) that if Hermann was a joint adventurer with appellee, his act in signing the

release of April 27, 1943 (Exhibit 11, R. 178) bound appellee, and their verdict would therefore be for appellants. Accordingly, there is implicit in the verdict a finding that Hermann was not a joint adventurer but was an employee of appellee. The 50% payable to Hermann was therefore a selling expense and must be deducted.

In *Landon v. Hill,* 136 Cal. App. 560, plaintiff sued for profits lost through the action of defendant landlord in evicting him. Plaintiff had carried on a bakery goods business. In modifying the judgment because of the fact that no allowance had been made by way of salary to the plaintiff himself in determining net profit, the District Court spoke as follows:

> "The last point urged by appellant as to the excessive amount of damage is that plaintiff and the court in computing the expenses of operating the bakery from which to determine the net profits realized, did not deduct anything by the way of salary to Landon himself, although he was the baker and carried on the business principally through his own efforts.
>
> It seems apparent that this was error. The value of the labor was independent of the lease and formed no part of the profits of the lease. If appellant had employed a baker his wages would have been deductible as an expense. In other words, the profit to be recovered is the net profit, to ascertain which, all sums expended in producing the crop or conducting the business, including rent and reasonable cost of marketing, are to be considered. (*McCready v. Bullis, supra; Rice v. Whitmore,* 74 Cal. 619 (16 Pac. 501, 5 Am. St. Rep. 479).)
>
> Therefore, in order to determine the profits of the business done by plaintiff, the item of labor, whether performed by himself or others, must be taken into consideration."

Accord:

Columbus Mining Co. v. Ross, 50 A.L.R. 1394, 290 S.W. 1052, 218 Ky. 98, and note at 50 A.L.R. 1397;

Klingman & Secoular v. Racine-Sattley Co., 149 Iowa 634, 128 N.W. 1109.

If it be contended that the 50% to Hermann was not wholly for his full-time services as a salesman but was in part for the value of the contract or as a "finding fee" to him, then it would be or partake of the nature of a royalty, and as such would have to be deducted. Royalties are deductible. In *Lacy Mfg. Co. v. Gold Crown Mining Co.,* 52 Cal. App. (2d) 568, 126 Pac. (2d) 644, damages were sought for alleged loss of expected profits from the operation of a quartz mill, arising from delay in performance of a contract for moving the units of the mill from one mine location to another. In rejecting the claim, the Court said (52 Cal. App. (2d) at 574, 126 Pac. (2d) at 647, col. 2):

> "But aside from the difficulties encountered by reason of the terms of the contract itself, there is not a sufficient showing of certain and immediate damage suffered; no factual statement of any ore blocked out; not even a statement that the structure below the surface of the earth was gold-producing or that any amount of ore could be mined and reduced within a specified time; no statement of the cost of mining and milling or of royalties to be paid. In short there is nothing to indicate the profits available to defendant during the 72 days in question. In the absence of these and allegations of the costs of labor, of the depreciation of the milling plant, of the cost of power and water; of royalties to be paid; of the amount of ore that could be mined and milled during the period in question, there was nothing in the cross-complaint to aid the court in trying the question of profits lost. Recoverable damages for any breach are only those which were reasonably in the contemplation of the

parties at the time of entering into the agreement. Johnson v. Levy, 3 Cal. App. 591, 86 P. 810; California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A.L.R. 114."

Prospective profits must be "diminished by charges composing an essential element" in the cost of producing the net residue finally remaining to the plaintiff, *Oakland California Towel Co. v. Sivils,* 52 Cal. App. (2d) 517, 520, 126 Pac. (2d) 651, 652, col. 2. The use of the terms "fixed costs", "overhead", "direct overhead", "indirect overhead", "indirect miscellaneous overhead", "profits", "loss", "detriment", "benefit", etc. (52 Cal. App. (2d) at 520, 126 Pac. (2d) at 652) is of no consequence; the "only matter of concern" (id.) is, what did the plaintiff lose as a result of the breach? The plaintiff at bar lost no more than the maximum it could have had left in its hands after paying Hermann his 50% commission or royalty or both, i.e., the plaintiff's "benefit lost" (id.) is no more than $14,746.43. Hermann is not a party to the complaint at bar and what he may have lost is not in issue, nor is there any basis in the law for swelling appellee's lost profits by including Hermann's.

V.

THE COURT BELOW ERRED IN REFUSING TO GIVE THE INSTRUCTION IN DEFENSE REQUEST NO. 37.

The requested instruction and the exception to the refusal to give are set out in Specification of Error IV. The request reads, R. 63:

> "I further instruct you that you must consider the fact that because no wine was delivered under the contract to the plaintiff it follows that the plaintiff was relieved from business hazard and responsibility

in the handling and disposing of the wine over a period of years, and was freed from any risks involved, and from time and trouble. From the award, if you make any, to the plaintiff, you should make a reasonable deduction from any arithmetical or calculated amount of net profits, because of that release and freedom from risk, hazard and responsibility, and saving from expenditure of time, trouble and energy over the period of time originally contemplated for completion of delivery in monthly installments. The amount of such deduction is not fixed in any particular percentage by law which leaves it to the good sense and wisdom of an intelligent jury."

The request is framed upon the ruling in the leading case of *Floyd and Speed v. United States,* 2 Ct. Cl. 429, 441, affirmed in *United States v. Speed,* 8 Wall. (75 U.S.) 77, last two paragraphs. Therein, Speed had during the Civil War contracted with the United States to slaughter and pack for the government 50,000 hogs, at a fixed price per hog, the hogs to be furnished by the government. After furnishing 17,132 hogs the government failed to furnish any more and the suit was in the Court of Claims to recover damages for the failure to furnish the remainder of 32,868 hogs. Speed had sublet his contract reserving "from 70 to 75 cents per hog" (2 Ct. Cl. at 441) and claimed as his damages at that rate. The Court of Claims ruled (2 Ct. Cl. at 441):

"From the amount reserved on the sub-letting is to be deducted a reasonable sum, on account of the relief of the contractor from responsibility for a large part of the contract, and for the time and trouble which a full performance would have required and imposed upon him. The balance will show the clear net profits that would have accrued on the unperformed part of the contract, and the damages to which the claimants are entitled. As they were relieved, by the relinquish-

> ment of two-thirds of the contract by the United States, of all the responsibility and risks involved in so much of it, as well as from devoting their time and attention to it to that extent, there ought to be a reasonable deduction on those accounts. Applying these rules and principles to the cases in hand, we think that, making all reasonable deductions, the sum of sixty (60) cents per hog would represent the true net profits to the contractors."

On an appeal by it to the Supreme Court, the government contended *inter alia* that "the rule for the measure of damages is not the correct rule as applied to the facts", as to which the Supreme Court said:

> "What would be the true rule is not pointed out. And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to-wit: the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.
>
> The leading case on this subject in this country is *Masterton v. Brooklyn,* 7 Hill, 62, and that fully supports the proposition of the Court of Claims."

Our requested instruction should have been given. By electing to sue immediately upon the claim of repudiation, the appellee relieved itself from any responsibility attending an execution of the contract by it and was entirely relieved from business hazard, risk and responsibility. It was benefited to a far greater extent than Speed was in his case, because the latter had a fixed rate of payment and profit per hog whereas appellee was at the hazard of the market for obtaining from its sales an excess over the

cost to it under the contract. The wholesale and retail selling prices posted by appellee in New York in the early part of 1943 were posted at a time when the Germans were in occupation of the wine-producing countries of France and Italy and those posted prices were obviously subject to collapse according to the course of the war. There was a wine scarcity, with abnormal prices. The business hazard connected with wine prices would be great and would extend over the greater part of two years in the course of delivery of the 26,691 cases, a carload a month, which would not have been completed until around the end of the year 1945. The case at bar is preeminently one for the application of the rule of damages laid down in Speed's case and the Court below erred in failing to give the rule of that case to the jury for their consideration.

VI.

THE COURT BELOW ERRED IN GIVING THE PLAINTIFF'S REQUEST NO. 10, SPECIFICATION OF ERROR VIII.

Appellee, as plaintiff below, in its Request No. 10 for an instruction, which was given by the Court, cited in support thereof "3 Williston Rev. Ed. p. 2475". The instruction given is without support in the law. It is not supported by the citation to Williston appended by plaintiff to its Request No. 10, which goes no further than to show that a "doubt" of solvency is insufficient to show insolvency. The passage occurs in § 880 of *Williston, Contracts,* under the section heading, "Insolvency or bankruptcy". However, the very next section, § 881, "Inability to perform unless the other party performs", shows a wholly different and independent head of inability, not dependent on solvency or insolvency; and it is the § 881

head that shows the error in instructing the jury that proof of actual insolvency is essential to a showing of inability.

The purchase of 26,691 cases at the contract prices amounted to an aggregate of $130,000 and $140,000. The purchase of 60,000 cases amounted to about $330,000. A single carload of 1500 cases amounted to about $8000. In the case of a falling market, we could never have collected any damages from them. Their net worth would not have enable them to pay more than some trivial amount less than $1000. Obviously, they would depend upon the wine to finance itself. Obviously, with a net worth of no more than $1000, even a single carload at $8000 would have to be self-financing. Ability to perform cannot be predicated upon the credit obtainable through receipt of the wine or the shipping documents covering it, *Brown v. Lee*, 5 Cir., 192 Fed 817; *Williston, Contracts,* § 881.

It appears without dispute from the evidence that appellee is what is commonly known as a "dummy" corporation. It is and was a wholly owned subsidiary of another corporation, R. 336, and it never at any time had a capital greater than the sum of $1000, R. 336. Any profits made by it were immediately paid out in dividends (R. 338) and its current liabilities at all times equaled its current assets, R. 338. The purpose of the formation of this "dummy", as stated by Elman, one of its officers, was to limit the liabilities of the officers of the mother holding company. In the face of this evidence, the Court instructed the jury that the inability of plaintiff to perform the contract was a matter of defense and not part of the appellee's case; that the burden of proving such a defense was on appellants and that they were required to prove that the appellee was actually insolvent,

R. 518. Coupling this instruction with the failure of the Court to instruct at all on the burden of proof, it is easy to see why the jury obviously took the view that the burden of disproving the appellee's case rested upon appellants.

A plaintiff who is not ready, *able* and willing to perform a contract on the due day cannot recover for an anticipatory breach of the contract by the other party, *Western Grocer Co. v. New York Oversea Co.,* 28 F. (2d) 518, 520, and if the plaintiff is financially unable to perform, he cannot be said to have been damaged in the case of a breach by the other party to the contract, *Gray v. Smith,* 9 Cir., 83 Fed. 824; *Petersen v. Wellsville City,* 8 Cir., 14 F. (2d) 38.

VII.

THE MOTION FOR JUDGMENT NOTWITSTANDING THE VERDICT.

A motion for a directed verdict in favor of appellants was made at the close of all the evidence on March 20, 1944, R. 465, and denied on that day, R. 470. The verdict was returned on March 22, R. 66. Within less than ten days after the reception of the verdict, i.e., on March 27, these appellants moved the Court under Rule 50(b), FRCP, R. 463-465:

> "To order the verdict of March 22, 1944, and any judgment thereon, set aside and to enter judgment in accordance with the motion for a directed verdict made by these defendants at the close of all the evidence, upon each and all of the grounds specifically stated in support of such motion for a directed verdict when it was made."

The motion was denied, R. 541.

Therefore, under Rule 50(b), if the Court should conclude that any one of our grounds of motion for a directed verdict is good, then the reversal should not be a general one but should be accompanied by a direction to enter judgment in our favor notwithstanding the verdict.

Dated, San Francisco,
November 29, 1944.

Respectfully submitted,
GEORGE M. NAUS,
LOUIS H. BROWNSTONE,
Attorneys for Appellants,
Pierre Bercut and Jean Bercut.

(Appendices A, B and C Follow.)

Appendices A, B and C.

Appendices

Appendix A

AGREEMENT

This AGREEMENT entered into this 29th day of January, 1943, by and between Pierre Bercut and Jean Bercut, doing business as a co-partnership, under the firm name and style of P & J CELLARS, License No. 14-P-175, at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part, and CHATEAU MONTELENA of New York, License No. WW9, with offices at 48 West 48th Street in the City and State of New York, herein represented by Serge Hermann, its duly authorized special representative, residing at No. 321 West 55th Street, Borough of Manhattan, City and State of New York, party of the second part.

WITNESSETH:

WHEREAS the party of the first part is the owner of certain stocks of wines of various kinds and vintage and WHEREAS the party of the second part is desirous of purchasing said wines on an installment basis over a period of years.

NOW, THEREFORE, in consideration of the mututal promises and covenants herein contained, and in consideration of the sum of One Dollar ($1.00) each to the other in hand paid, receipt of which is hereby acknowledged, it is mutually agreed as follows:

FIRST: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled

and stored, and the balanced to be bottled under terms and conditions to be mutually agreed upon.

Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of February, 1943, and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for the holidays a maximum of two cars may be shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy ... 7,167 cases of 12 bottles of fifths per case
Claret ..... 7,145 cases of 12 bottles of fifths per case
Rhine Wine 6,587 cases of 12 bottles of fifths per case
Sauterne ..... 4,095 cases of 12 bottles of fifths per case
Sherry ..... 834 cases of 12 bottles of fifths per case
Port ..... 863 cases of 12 bottles of fifths per case

and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents ($5.25) per case and the sweet wines at Six Dollars ($6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents ($5.50) per case for dry wines and Six Dollars and twenty-five cents ($6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been bottled, is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945.

FOURTH: Second party hereby agrees that the assorted quantities bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire.

FIFTH: That the manner of payment shall be by sight draft with bill of lading attached F.O.B. San Francisco, California, drawn on second party for each shipment by car or steamer as the case may be.

SIXTH: The party of the first part herewith stipulates that all taxes of any description levied upon said wines have been paid as of this date and second party herewith agrees to assume the payment of any and all taxes that may be levied upon said wines subsequent to the date

hereof, by the Federal, State, Municipal or any other constituted authority.

SEVENTH: The party of the first part shall assume all storage charges on the stocks remaining unshipped in San Francisco, and will carry sufficient insurance to protect the interests of both parties hereto, but in the event of destruction or damage to the stock due to fire, earthquake, acts of God, acts of war, the public enemy or any other causes beyond the control of party of the first part it is clearly understood that the terms hereof shall be inoperative.

EIGHTH: The party of the second part shall supply at his own expense labels of his own choice to be affixed to the bottles, and shall also supply a special strip to be attached to each bottle of suitable design and appearance approved by party of the first part with the inscription placed thereon "SELECTED BY BERCUT FRERES", and the party of the second part without allotment herewith agrees to conform to all the existing rules and regulations pertaining to labels and to any future legal aspects that may be formulated holding the party of first part harmless from any and all controversies that may arise.

NINTH: The party of the first part hereby agrees to supply suitable cases for shipment out of San Francisco, said cartons to be in conformity with recognized practice in the shipment of wines to New York, but in the event of inability to secure standard cartons due to war conditions or priorities reserves the right of substitution to other cartons mutually considered to be of sufficient tensile strength for shipment to New York under normal conditions of handling by the carriers. The party of the first

part hereby agrees to furnish the labor for casing and affixing the labels and to deliver on cars or docks as desired in San Francisco.

Tenth: The party of the first part hereby grants unto second party the right to establish its own resale prices in all states, territories or for export.

Eleventh: The parties hereto mutually agree that the terms and conditions of this agreement shall be binding upon the heirs, executors, beneficiaries or successors in interests of both parties, and that in the event of any disagreement or conflict of interpretation respecting any of the provisions hereof it is specifically agreed that the laws of the State of California shall govern and that should it be necessary to adjudicate any of the provisions herein such adjudication shall be submitted to a Court of competent jurisdiction in San Francisco, California.

In Witness Whereof the parties hereto have set their hands this 29th day of January, 1943.

P & J Cellars,
By Peter Bercut,
First Party.

Chateau Montelena of New York,
By Serge Hermann,
Second Party.

Appendix B

San Francisco, California,
February 3, 1943.

Chateau Montelena of New York,
48 West 48th Street,
New York City, N. Y.

Attention: Mr. Serge Hermann

Gentlemen:

With reference to our agreement executed on the 29th day of January, 1943, the following revisions or additions are herewith made, said additional data to be included and to form part and parcel of the original agreement:

1. That the quantities stipulated as bottled as of this date are to the best of our knowledge vintage wines of 1937 and 1938.

2. That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence.

3. That the wines purchased have been produced and bottled by the California Wine Association and that an inscription bearing these words can be placed upon the labels.

All other terms and conditions are to remain without change and in full force and effect.

Very truly yours,
P & J Cellars,
By Peter Bercut.

WGE:HF

Appendix C

[Plaintiff's Exhibit 3, in at R. 86; letter from Hermann at New York, February 15, 1943, addressed to Pierre Bercut, c/o Bercut Brothers.]

Dear Pierre:

I just returned home last Saturday afternoon. For the last couple of hours we have done nothing else, Mr. Benziger, Mr. Elman and myself, but to talk over the arrangements that I made with you, and I am glad to advise you that they are quite pleased, and I have no doubt that we will develop relations which will prove mutually profitable and agreeable.

The first thing we are now doing is to work on a label. Many suggestions are being made, and of course before we decide upon one, we want to think the matter over very carefully because it is of such extreme importance, and once we have decided what label should be used, it will have to be a good label. At any rate, we will send our final choice to you, so that you may have a chance to give us also your reaction to same.

From now on I suggest to you that all correspondence and everything pertaining to our relations be written direct to Park, Benziger & Co., Inc., 24 State St., New York, N. Y., so that it may be given proper attention.

As explained to you in San Francisco, it is my intention, as soon as a label is finished, to come over to San Francisco so as to supervise the first shipment, and I sincerely trust that either Mr. Benziger or Mr. Elman may find it possible to join me in order to meet you and lay the foundation of our future relations.

With reference to the Chianti which you were kind enough to offer me, we are enclosing herewith orders,

which are self-explanatory. Would you be kind enough to send us a case of this Chianti in pints, billing us with same.

With regards to the label, you will recall that when we were down to see Verdier you showed me a label with a picture of the Napa Valley, which was indeed very beautiful. You suggested then that you would secure the cut for me. We have an idea that this picture of the Napa Valley would look very pretty in conjunction with the label that we have in mind. Will you please, therefore, send us the cuts of the Verdier label.

If you have already taken the pictures which you contemplated taking of the warehouse with the bottles racked, I would appreciate your sending them to us. If what you have taken is in the form of films, as you intended, we can make the enlargements here ourselves. Everything, of course, in the line of advertising will help.

I have told Park, Benziger & Co. that you would be kind enough to co-operate with them by making a few placements in some of the high spots of San Francisco on our new wine labels. They appreciate your thoughtfulness in this matter, and we will at some future date be able to use this type of placement for promotion material here in the East.

I take this opportunity in behalf of Mr. Benziger, Mr. Elman and myself of thanking you for the many courtesies shown me when I was in San Francisco and can assure you of our future co-operation with the hope that it will benefit all concerned.

With kindest personal regards to Jean, Henri and yourself,

Sincerely yours,

SERGE.